ONTARIO
LABOUR RELATIONS BOARD
REPORTS

September/October 2009

Ontario

ONTARIO LABOUR RELATIONS BOARD

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A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [2009] OLRB REP. SEPTEMBER/OCTOBER

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

CASES REPORTED

COURT PROCEEDINGS

SUBJECT INDEX

1445-09-R; 1472-09-U Kathleen O'Brien, Applicant v. United Food and Commercial Workers International Union, Local 1000A (AFL-CIO-CLC), Responding Party v. **1646419 Ontario Inc. carrying on business as Best Western Mariposa Inn & Conference Centre,** Intervenor; United Food and Commercial Workers Canada, Local 1000A, Applicant v. 1646419 Ontario Inc. carrying on business as Best Western Mariposa Inn & Conference Centre, Steve Weeks and Kathleen O'Brien, Responding Parties

Bargaining Rights – Membership Evidence – Practice and Procedure – Termination – In response to a termination application, the union made an unfair labour practice complaint based, in part, on the status of two disputed employees and their role in the termination application process – The UFCW requested production of all communications and correspondence between the employer, the two employees and their legal counsel, including information relating to payment of their legal fees – The Board noted that the Supreme Court in *Maranda v. Richer* found that legal accounts were subject to presumptive solicitor-client privilege in the criminal context, and that the Ontario Superior Court of Justice has appeared to apply *Maranda* in a non-criminal context – The union was unable to establish the disclosure requested would not violate the confidentiality relationship, and accordingly the Board declined to order production – Matter continues

BEFORE: *Ian Anderson*, Vice-Chair, and Board Members *J.A. Rundle* and *C. Phillips*.

APPREARANCES: *Tim Timpano, Kathleen O'Brien* and *Steve Weeks* appearing for Kathleen O'Brien and Steve Weeks; *James Robbins, Patrick Groom, Don Taylor* and *Andrew MacIsaac* appearing for the United Food and Commercial Workers Canada, Local 1000A; *Andre Nowakowski, Stacey Roe* and *Debbie Peacock* appearing for 1646419 Ontario Inc.

DECISION OF THE BOARD: October 21, 2009

1. Board File No. 1445-09-R is an application for termination of bargaining rights pursuant to section 63 of the *Labour Relations Act, 1995*. The union seeks dismissal of that application pursuant to section 63(16) of the Act. Board File No. 1472-09-U is an unfair labour practice complaint under the Act by the union in relation to the termination application. Central to both matters is the union's allegation that Weeks and O'Brien exercise managerial functions or have access to confidential labour relations information with the result that pursuant to section 1(3)(b) of the Act, they are not employees with the meaning of the Act, or that they were acting on behalf of the employer in bringing the termination application.

2. On the agreement of the parties, the style of cause in both files is amended to reflect the correct name of the corporate party: "1646419 Ontario Inc. carrying on business as Best Western Mariposa Inn & Conference Centre".

3. A hearing was held on October 6, 2009. This decision addresses a number of preliminary issues advanced by the parties at that hearing.

Production requests

4. By letter dated September 17, 2009 the union requested production of the following documents:

> 1) All personnel records for James Brown, Kathleen O'Brien, Tavish Sutherland, and Steve Weeks including, but not limited to, all payroll records from October, 2008 to date, and job descriptions and lists of responsibilities;
>
> 2) All personnel records for Nathaniel Hammond and Jacob Hammond including, but not limited to, all payroll records from April, 2008 to date, and job descriptions and lists of responsibilities;
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> 3) All weekly work schedules from April 2008, to date;
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> 4) An organizational chart, or charts, indicating who reports to whom;
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> 5) All disciplinary records for all disciplines issued to employees from October, 2008 to date;
>
> 6) A floor plan and particulars with respect to the locations of the administrative offices within the Employers premises and who has occupied these offices from October, 2008 to date;
>
> 7) All communications and correspondence between the Employer and Kathleen O'Brien and Steve Weeks concerning the current matters before the Board, the first Application for Termination of bargaining rights dated August 7, 2009, and any other communications or correspondence relating to these matters, including but not limited to, notes, memos, letters, e-mails, and other electronic records;
>
> 8) All communications and correspondence between the Employer, Kathleen O'Brien, Steve Weeks, and counsel for Ms. O'Brien and Mr. Weeks relating to recommendations for legal counsel and relating to the payment of their legal fees, including but not limited to contracts, bills, notes, memos, letters, e-mails, and other electronic records.

5. At the hearing: the employer agreed to produce the documents outlined in request (1); the union withdrew production request (2), as it has abandoned its challenge to the status of the named individuals; the employer stated that there were no documents in existence with respect to production request (4); the union advised that it had received documents in relation to production request (5), and that it assumed there had been full compliance; the employer and Weeks and O'Brien advised that there were no documents in existence with respect to production request (7).

6. With respect to production request (6), the union confirmed that it had received a floor plan from the employer. The employer states that in its letter providing this document it identified the location of the administrative offices. We see no need for a further order with respect to this production request.

7. With respect to production request (3), the employer produced the weekly work schedules, but the union states that the weekly work schedules do not contain certain information which it had anticipated they would. Accordingly, the union sought production of the employer's time records in relation to the banquet, restaurant and bar departments. In particular, the union seeks the time records on the basis that they may provide evidence of who actually worked and who approved that work and what they were actually paid. The employer resisted this request on the basis that the union had enough information already. In our view, if the documents contain the information identified by the union, they may be arguably relevant to these proceedings. Accordingly we directed them to be produced at the hearing in accordance with the union's request. Following this ruling the employer raised the voluminous nature of these documents as a problem and requested that the period of production be limited. Counsel advised the Board that they believed that they would be able to resolve this issue through discussions. Should there be issues outstanding with respect to this production request, the parties may make written submissions to the Board for consideration.

8. With respect to production request (8), the union asserts that the documents it seeks are communications with respect to payment, and not legal advice, and accordingly are not subject to solicitor-client privilege. In the alternative it argues that such communications would relate to furthering unlawful conduct, i.e. employer involvement in the termination application, and accordingly are not protected by solicitor-client privilege. It also argues that the documents it seeks are precisely the types of documents that this Board has ordered produced before in the context of termination applications. It cites *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, *C.J. Pink Ltd.*, [2003] O.L.R.D. No. 1814 (May 26, 2003) and *Banlake Associates Ltd. (c.o.b. Bancroft I.G.A.)*, [1998] OLRB Rep. July/August 543.

9. The employer asserts with respect to any such communications between O'Brien and Weeks and their counsel, that the documents should not be produced on the basis of solicitor-client privilege, but concedes that the privilege if any is that of O'Brien and Weeks. It cites no authority. With respect to any such communications between itself and O'Brien, Weeks or counsel for O'Brien and Weeks relating to payment of his fees, not surprisingly it does not assert solicitor-client privilege, but it states that there are no such documents.

10. O'Brien and Weeks assert that union's pleadings are insufficient to support a claim for production of these documents with the result that this request is premature. In the absence of proper particulars they state that they are not prepared to argue whether any such documents are privileged.

11. We decline to order production of any communication between O'Brien and Weeks and their counsel at this time on the basis that they may be the subject of presumptive solicitor-client privilege. In *Maranda v. Richer*, [2003] 3 S.C.R. 193 (a case which has only now come to our attention) the Supreme Court of Canada noted that the courts had been divided on the question of whether solicitor-client privilege attached to legal accounts. The Court resolved this dispute, at least in a criminal law context, by holding that such documents were presumptively privileged, unless the party seeking their disclosure established that the disclosure would not violate the confidentiality relationship. We note as well that in *Ontario (Ministry of Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (July 16, 2007), the Ontario Superior Court of Justice appeared to apply *Maranda* to a non-criminal context.

12. We are not satisfied that the union has demonstrated that the disclosure of the documents it seeks would not violate the confidentiality relationship, in its pleadings or otherwise, and we are not prepared to conclude that the presumptive solicitor-client approach should not be applied in proceedings before the Board in the absence of more complete argument. We note in this respect that the Board decisions cited by the union pre-date *Maranda*. The issue of whether or not records relating to payment of legal fees fell within the scope of solicitor-client privilege did not arise on the facts in *Pritchard* and no reference is made to *Maranda* by the Court, which it had decided less than a year before, in that decision. In these circumstances, we are not prepared to conclude that *Pritchard* is in any way at odds with *Maranda*.

13. We are also not satisfied that the union is entitled, at this point, to production of any communications between O'Brien and Weeks and their counsel on the basis that such communications were in furtherance of unlawful conduct. In our view, a production request on this basis is subject to a two step procedure described in *The Law of Evidence in Canada*, Second Edition, *Sopinka* et al., at 14.62:

> As the solicitor-client privilege should not be interfered with, except to the extent that it is absolutely necessary, the best approach may be to adopt the two-step procedure laid down by the Supreme Court of Canada in *R. v. O'Connor* [[1995] 4 S.C.R. 411] in instances where the defence in a criminal case seeks production and disclosure of records in the possession of a third party. In the first step, the onus is on the party seeking disclosure to satisfy a judge that the communications are likely to be relevant. In meeting this threshold test, the party seeking disclosure must rely upon evidence external to the communications themselves. If the judge finds that the communications are likely to be relevant, then the judge proceeds to conduct an *in camera* inspection of the documents to determine whether, in fact, any of the communications are caught by the crime/fraud exception. Use of this procedure affords the judge the opportunity to review communications which, although apparently in furtherance of a criminal purpose, may, upon closer scrutiny, be found to have been nothing more than a consideration of rights and obligations in respect of existing incriminating evidence, and thus entitled to confidentiality under the solicitor-client privilege.
>
> [Emphasis supplied.]

There is no evidence before us which would satisfy the emphasized first step of this procedure.

Limits on the ability of the employer and O'Brien and Weeks to examine each other's witnesses

14. The union argues that the employer on the one hand and O'Brien and Weeks on the other are aligned in interest with the result that they should be limited to asking non-leading questions of each other's witnesses with respect to areas of evidence not covered. No authority was cited for this proposition. We are not prepared to make such a blanket order. We do note, however, that evidence elicited by leading questions of a friendly witness will likely be given less, or little, weight by the Board and that the Board has the ability to control its own procedure by limiting repetitive evidence.

Scope of evidence which may be led by the union

15. The employer argues that it is not open to the union to assert that supervisors who have always been in the bargaining unit are not in the bargaining unit. In the alternative, it argues that the union could only do so if its pleadings suggest that there had been a change in duties of the supervisors and asserts that the union has failed to discharge this onus. In the further alternative, it argues that the Board should only hear evidence with respect to any changes in duties of the disputed individuals. It cites: *Park Lane Nursing Home Limited*, [1971] OLRB Rep. July 945; *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121; and *Dominion Stores Limited*, [1983] OLRB Rep. Dec. 2006.

16. The issue before the Board is not whether the positions of supervisor are in the bargaining unit. The issue for the Board is whether the disputed individuals are employees within the meaning of the Act or are excluded by virtue of section 1(3)(b). The cases cited by the employer all pre-date *The Windsor Star*, [1988] OLRB Rep. Apr. 427 in which the Board expressly abandoned the "changes" policy. That case has been consistently followed by the Board since: see for example *Durham Catholic District School Board*, 2004 CanLII 35904 (ON L.R.B.) (October 25, 2004).

17. The fact that the disputed individuals' positions have been in the bargaining unit for years, and that O'Brien was a steward for the union since the inception of the bargaining unit and continued to be one until just prior to the application for termination of bargaining rights, will be relevant facts to our determination, in particular given that the union alleges that employees would perceive O'Brien and Weeks as having acted on behalf of the employer, but they are not determinative of whether the disputed individuals are not employees by virtue of section 1(3)(b).

Next steps

18. The hearing will proceed to determine the status of the disputed individuals. In accordance with the Board's practices and procedures, it is incumbent upon the party asserting that an individual is an employee to bring that individual to the hearing. We also consider it efficient that either counsel for the employer or counsel for Weeks and O'Brien lead this evidence. The parties may address issues of onus in final submissions.

19. This matter is remitted to the Registrar to set further dates.

1463-09-R National Organized Workers, Applicant v. **ABC Climate Control Systems Inc.**, Responding Party

Certification – Status – Trade Union – The sole outstanding issue concerned a determination as to whether NOW was a trade union under the Act – Submissions were provided to the Board on the issue of whether NOW had any members as of the date of the application – NOW's constitution did not have a mechanism for accepting individuals into membership – However, all who were present at the foundational meeting of NOW: appeared to have signed membership cards; unanimously agreed to accept those signing membership cards as members; unanimously adopted the constitution; and unanimously confirmed those who had signed cards as members – The Board applied the factors from *Canadian Labour*

***Congress v. University of Toronto* and found that all four were met: NOW had membership; the members and officers were bound by a formal set of rules; NOW was formed to regulate relations between employees and employers; NOW is capable of acting through its elected officers – The Board found that NOW was a trade union within the meaning of the Act – Certificate issued**

BEFORE: *Ian Anderson*, Vice-Chair.

DECISION OF THE BOARD: October 19, 2009

1. This is an application for certification filed under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") brought by National Organized Workers (NOW).

2. By decision dated September 11, 2009, the Board noted that the only outstanding issue, prior to issuing a certificate to NOW, was determination of the question of whether NOW was a trade union within the meaning of the Act.

3. Notwithstanding the prior agreements of the parties that the Board satisfy itself on this question of NOW's status on the basis of materials filed and without the necessity of a hearing, the Board invited submissions on one particular issue: whether NOW had any members as of the date of the application. This issue arises because, on the one hand, NOW's constitution does not have any mechanism for accepting individuals into membership. On the other hand, all those present at the foundational meeting of NOW: appeared to have signed membership cards (a fact confirmed by NOW in its submissions) in NOW; unanimously agreed to accept those signing membership cards as members; unanimously adopted the constitution of NOW; and then unanimously confirmed those who had signed membership cards as members of NOW.

4. The Board has reviewed the submissions filed by the parties.

5. "Trade union" is defined under section 1(1) of the Act as follows:

> "trade union" mean an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes provincial, national or international trade certified council of trade unions and a designated or certified bargaining agency."

6. I find the following summary of the applicable law from *Canadian Labour Congress v. University of Toronto* [1999] OLRB Rep. July/August 742 useful:

> 10. In applying the definition of "trade union", the Board's caselaw establishes that:
>
> 1) trade unions are, for the most part, unincorporated associations of individuals;
> 2) two or more such individuals must have agreed to be bound by the terms of an identifiable written agreement between them;
> 3) one of the purposes of the organization, usually expressed in he constitution, must include the regulation of relations between employees and employers;

> 4) the organization must be viable and therefore must have at least one officer, official or agent to act on its behalf.
>
> 11. The Board has also set out a "five-step" guideline for those wishing to set up a trade union. These steps are set out in *Local 199, U.A.W. Building Corporation* [1977] OLRB Rep. July 472, as follows:
>
> 1. a constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
>
> 2. a constitution must be placed before a meeting of employees for approval;
>
> 3. the employees attending such a meeting should be admitted to membership;
>
> 4. the constitution should be adopted or ratified by the vote of said members;
>
> 5. officers should be elected pursuant to the constitution.
>
> 12. Difficulties, however, often arose where the steps were not followed precisely or were not followed in the right sequence. The Board therefore subsequently noted that the five steps originally laid out were meant to be facilitative rather than restrictive and that following these five steps was not the only manner in which a trade union could achieve status. For example, in *Caterair Shadow Canada Limited* [1994] OLRB Rep. April 365 para. [8], the Board stated:
>
> > More generally, the Board is interested in the substantial, rather than technical, compliance with the procedural steps involved in the formation of a trade union, since the purpose of its inquiry is not so much in ensuring that the precise requirements of the constitution are followed rather than to ascertain that the organization seeking trade union status is a viable one for the purposes of carrying out its obligations under the Act.

This excerpt serves to highlight the fact that the issue for the Board is not whether an organization seeking to prove that it is a trade union within the meaning of the Act has complied with the "five-steps": the "five-steps" are only a guideline as to a procedure which might be followed by such an organization. Rather, the issue is whether or not two or more individuals have agreed to form an organization, the purposes of which include the regulation of relations between employees and employers, and be bound by an identifiable set of rules (which will almost always, if not invariably, be written down) governing that organization, and further whether that organization is viable, and therefore has at least one officer, official or agent through which it can act.

7. In *Ontario Hydro* [1989] OLRB Rep. Feb. 185, at paragraph 48, the Board made the following statement which is directly applicable to the outstanding issue in the case at hand:

> .... No authority was offered for the proposition that an "organization" cannot be "formed" unless its constitution prescribes a form of membership application. We know of no such authority. As the unincorporated association is a "complex of contracts", admission to membership involves a change in the identity of the contracting parties which, like any change in the terms of the contract, can only be effected in one of two ways: by the express consent of all existing members, or in accordance with the terms of the constitution to which the existing members have subscribed. From the "offer and acceptance" perspective from which issues about the formation of a contract may be assessed, a non-member's application for membership is an offer to enter into a contract with the existing members on the terms set out in the constitution. The contract is made when accepted in some manner by those existing members or by some person or persons authorized by the existing members to accept on their behalf. That delegated authority may be found in the constitution; its eligibility provisions will then define the limits of that authority. While provisions facilitating admission to membership otherwise than by unanimous consent of existing members may be a practical necessity if a trade union organization is to function efficiently, it is not clear why the inclusion of such provisions in its constitution would be a legal prerequisite to formation of an organization. ....

I agree with that statement. Upon consideration, I can see no reason why a group of individuals seeking to form an unincorporated association cannot unanimously agree to bind themselves to an identifiable set of rules.

8. The employer relies on a number of cases in which the Board found that an organization did not have trade union status because the organization did not appear capable of admitting persons to membership.

9. In *Mecanobus Ontario Ltd.*, [1996] O.L.R.D. No. 1770, the only material before the Board was the constitution of the applicant. There were a number of difficulties with the constitution, including the provisions with respect to membership. There was, however, no evidence before the Board that a group of individuals had unanimously agreed to be members of the organization such as in the case at hand.

10. In *Teledyne Specialty Equipment Metal Products*, [1996] O.L.R.D. No. 3461, the issue was whether a shop committee constituted a trade union within the meaning of the Act, with the result that a "collective agreement" between it and an employer constituted a bar to an application for certification. The shop committee had been formed over 20 years before. There were no records of its foundational meeting. There was no constitution, or as the Board put it in *University of Toronto*, supra, an "identifiable written agreement" by which members of the shop committee agreed to be bound. The lack of some "ascertainable contractual bond" was the basis for the Board's decision that the shop committee was not a trade union within the meaning of the Act. By contrast, in this case there is evidence that the individuals in attendance at the foundational meeting unanimously agreed to be bound by the written constitution of NOW.

11. The employer notes that in *Ontario Hydro*, supra, the Board alluded to the possibility that the failure of a constitution to impose membership obligations might have as a consequence the failure to create the necessary contractual relationships. In this case, however, NOW's constitution does impose obligations upon individuals who become members of NOW, e.g. to pay dues and to

take the member's pledge to comply with the terms of the constitution. Once an individual becomes a member of NOW, as a result of the unanimous agreement of all the others, those obligations apply.

12. Finally, I note that in *KUS Canada Inc.*, [2004] OLRB Rep. Nov./Dec. 1127 (December 2, 2004) the Board concluded that there was no evidence that any members were accepted into membership at the foundational meeting (see paragraph 64 of that decision). Further, unlike the present case, the constitution failed to impose obligations upon individuals who became members of the organization whose status was in issue to pay an initiation fee or agree to be bound by the constitution (also at paragraph 64).

13. In the result, I am satisfied that NOW had membership as of the date of the application as a result of the unanimous agreements of those at the foundational meeting. It follows that the individuals purportedly elected as officers at the foundational meeting were not, as mooted by the September 11, 2009 decision, ineligible to hold office by virtue of not being members of NOW. Those members, and the officers, have agreed to be bound by a formal set of rules, contained in the written constitution of NOW. One of the purposes for which NOW was formed is the regulation of relations between employees and employers through collective bargaining. NOW is capable of acting through its elected officers. Accordingly, I find that it is a trade union within the meaning of the Act.

14. While the September 11, 2009 decision did not invite submissions on any question other than whether or not NOW had any members, the employer has made submissions with respect to several other issues which I will briefly address.

15. The employer points to a number of errors and deficiencies in the constitution of NOW. The errors and deficiencies are generally minor in nature, the most frequent example being numbering errors. None of them affect the viability of the organization. Further, the constitution also contains provisions for its own amendment by which such deficiencies could be remedied. Indeed, NOW asserts that the Executive Board of NOW has already approved amendments to its constitution which address some of the issues raised by the employer in this case.

16. The employer references the lack of evidence that those at the foundational meeting took the membership pledge or had paid any membership dues, referenced in the Board's September 11, 2009, as an indication that NOW is not a viable organization. The membership pledge and the payment of dues were referenced in the Board's earlier decision as possible indicia of membership. I am satisfied, for the reasons stated above, that NOW has membership on the basis of the unanimous agreements. Any failure to take the membership pledge or payment of dues is, in this context, an internal union matter.

17. A certificate will issue to the applicant with respect to the following bargaining unit:

> all employees of ABC Climate Control Systems Inc. at 54 Bethridge Road, Toronto, Ontario save and except group leaders and persons above the rank of group leader, clerical, office, sales and accounting staff.

18. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of thirty (30) days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

19. The responding party is directed to post copies of this decision immediately, in locations where they are most likely to come to the attention of the affected employees. These copies must remain posted for fifteen (15) days from the date of this decision.

3497-07-ES Accuworx Inc., Applicant v. Director of Employment Standards, Responding Party

Employment Standards – The employer, an environmental clean-up operator, sought review of orders to comply with the "hours of work" provisions of the ESA, arguing that its work pertained to construction at the site and therefore it was exempt from the limitations set out in the Act – The employer suggested that its work unclogging systems or removing contaminated spills restored the functionality of its clients' systems and was, therefore repair (i.e., construction) – The Director of Employment Standards' position was that the employer was maintaining the operations it was contracted to service and that only a small portion of its work involved actual construction – The Board found that "remediating the site" of a spill does not restore the functionality of a system but merely removes the contaminant; similarly, at a traffic accident, the removal of debris from the road cannot be "repairing" or "altering" the site because there is no nexus between the clean-up activity and the road system; and unclogging a pipe does not add or subtract from a system or equipment, however defined; finally, emptying and sanitizing tanks is not repair, but maintenance – Application dismissed; order affirmed

BEFORE: *Christine Schmidt*, Vice-Chair.

APPEARANCES: *Doug Quirt* and *Jason Rosset*, for applicant; *Brian Blumenthal* and *Christy Ashton* for the responding party.

DECISION OF THE BOARD: September 9, 2009

1. This employer application, made pursuant to section 116(1) of the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended (the "Act"), seeks to review an Order to Comply, number 36122. The Order was issued by an Employment Standards Officer ("ESO") pursuant to section 108 of the Act on January 14, 2008. The Applicant, Accuworx Inc. ("Accuworx") seeks to review the violations found by the ESO pursuant to sections 17 and 18 of the Act. These sections of the Act pertain to the regulation of hours of work for employees to whom the Act applies.

Framework for Application for Review

2. Accuworx concedes that its employees were working in excess of the hours permitted by the Act. However, Accuworx challenges the Order to Comply on the basis of the assertion that it is a business that falls within the "construction industry" as defined in Regulation 285/01 ("Regulation") with the result that its employees are exempt from the relevant provisions of the Act.

3. Under the "Exemptions Re Hours of Work and Eating Periods" in the Regulation, section 4(1)(d) sets out sections 17, 18, and 19 of the Act do not apply to "a construction employee." Section 1 defines "construction employee" to mean:

> a) an employee employed at the site in any activities described in the definition of "construction industry", or
>
> b) an employee who is engaged in off site work, in whole or in part, but is commonly associated in work or collective bargaining with an employee described in clause (a).

Section 1 also defines construction industry:

> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site.

Issue

4. Are employees of Accuworx construction employees as defined in Section 1 of the Regulation? That is to say, are they employed at the site in any activities described in the definition of construction industry?

5. If the Board finds Accuworx employees to be construction employees, they are not entitled to the hours of work protections afforded to other non-exempt employees covered by the Act. As such, the Order to Comply would be set aside. If the Board finds that Accuworx employees are not construction employees then the Order to Comply is to be affirmed.

Facts

6. Jason Rosset, the President of Accuworx, testified that his company employs between 20 and 30 employees. He explained that three of its employees are office employees who do not work at the sites where Accuworx is contracted to perform services. Although based in Brampton, the company attends at sites throughout the province. Accuworx operates a fleet of vacuum trucks and is licensed by the Ministry of Environment (MOE) to transport and dispose of a wide range of controlled materials. The materials vacuumed into the trucks' tanks may or may not be disposed of off site depending on the nature of the material and the site at which the work is undertaken.

7. Mr. Rosset described Accuworx as a company that contracts to provide services whereby "we repair systems in industrial places and remediate sites with hazardous materials." These latter sites that are "remediated" include shipyards, lakes, rivers, streams, highways and railsides. In addition, Accuworx may undertake work at high rise commercial or residential sites or at low rise home sites. At high rise sites or home sites, Accuworx engages in hydro excavation whereby it removes soil in and around underground utilities. Mr. Rosset confirmed that his company does "industrial vacuuming," "industrial cleaning," "high pressure blasting" and also agreed that Accuworx provides "environmental and waste management services" to its clients. These latter characterizations of work undertaken by Accuworx were on the company's website in September 2008 and were stated by Mr. Rosset to be "ad words" reflecting the marketing purpose of the website.

8. In addition to the website as it was in September 2008, documentation produced during the course of the hearing included all Accuworx work orders for the 2007 calendar year, bound in monthly volumes, as well as "manifest documents," which forms are necessarily completed when controlled materials are transported. Photographs capturing work in progress at various sites and a sample of training certificates reflecting a limited representation of some of the training undergone by Accuworx employees to carry out its work were also tendered in evidence.

9. Mr. Rosset testified that in 2007 more than half of Accuworx's work was done for Stelco Inc. Accuworx has a trailer located at the Stelco plant and is given instructions about which "repairs" are to be done on a daily or weekly basis. For example, when gas lines get clogged as a result of fuel transported through them to heat coal, Accuworx uses water pressure to unclog the lines. Another example of typical work at Stelco Inc. related to clearing out material when conveyors had broken down and been buried. In cross-examination, Mr. Rosset confirmed that its "main business" at Stelco Inc. is responding to spills similar those on public roads. In reference to the amount of work at Stelco Inc. that involved dealing with spills Mr. Rosset stated: "call it emergency response – it is a lot of the time spills."

10. Accuworx had also undertaken work on an occasion when it was called out to Pearson airport. Stormwater tanks had become contaminated. Runways had been shut down and Accuworx employees had to enter the underground tanks wearing protective gear. They removed the contaminated material from the tanks and sanitized them. Mr. Rosset estimated that shifts worked by Accuworx employees on the Pearson airport contract ranged from four-hour shifts to shifts that could have been up to 18 or 19 hours.

11. Yet another example of work Accuworx was contracted to undertake was in circumstances where a tank at a water treatment plant became filled with "sludge." Accuworx removed the "sludge" and transported it off site. On another occasion, after a fire, Accuworx was called in to vacuum the contaminated water that had flooded the site. The vacuuming and removal of the water was a precondition to others accessing the site.

12. Mr. Rosset initially estimated that between 35% to 70% of its work, varying month to month, related to its response to spills, be it spills on highways (or railsides) or in an industrial setting (such as at the Stelco plant). In cases of spills, Accuworx's work continues until the vacuuming process is complete and the material is transported from the site (in many cases). Mr. Rosset stated that "pretty much the balance" of its work related to "repair" or "clean up" work at industrial facilities, depending on one's characterization of the work, in response to machines or systems that had stopped functioning or had broken down. In these circumstances, the problem is either resolved by Accuworx's intervention or is followed up by another contractor depending on the nature of the problem and Accuworx's intervention. This also, Mr. Rosset estimated, amounted to between 35% to 70% of Accuworx's work. Mr. Rosset testified that 1% to 2% of its work was at residential or other commercial construction sites.

13. A review of the evidence presented by Mr. Rosset indicates that typical situations in which Accuworx is contracted are the following:

a) In industrial plants, where there has usually been an unplanned equipment or system failure that necessitates:

i) the use of water pressure to break down solidified deposits (for example gas or carbon in tanks or lines),

ii) the identification of the location of leaks in systems or equipment,

iii) and/or the vacuuming up of spills caused by leakage of material (for example acid, diesel, oil, resin, ink, dust, paint, glycol) from a piece of equipment or operational system).

b) At roadside spills or derailments (involving the release of contaminants such as oil, diesel or others). Depending on the size of the spill and its location, and time of year, varying amounts of soil, grass, and/or snow are vacuumed into the truck(s), the contents of which are disposed of at a site equipped to handle the material. In circumstances where the spill extends to a water surface, Accuworx may also be involved in skimming or otherwise ensuring the removal of the contaminant in question. At these spill scenes, there may be persons from the MOE, Fire and/or others who are equipped to deal with or involved in the emergency response.

Position of Accuworx

14. Accuworx's position is premised on the fact that Regulation 285/01 exempts construction employees from sections 17, 18 and 19 of the Act. As set out above, construction employee is defined in the Regulation as an "employee employed at the site in any of the activities described in the definition of construction industry." Accuworx submits that an employee who engages in any activities described in the definition of construction industry for "any part of his time" is captured by the Regulation. Also, although Accuworx maintains that the majority of the company's work is in altering or repairing sites, its position is that to be captured by the definition of "construction industry" it is sufficient that the business be engaged in any of the enumerated activities "occasionally" – which it contrasts with "primarily."

15. The basis for Accuworx's assertion is that in the definition section of the Regulation, another definition of an employee, namely an "information technology professional" is defined as one "who is primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized and professional judgement" (my emphasis). Accuworx contends that the absence of the word "primarily" as a qualifier to being employed in the definition of construction employee supports its proposition that a construction employee need only engage in any enumerated activity in the definition of construction industry for "any part" of their time. Likewise, Accuworx contends that the absence of the word "primarily" in the definition of construction industry means that Accuworx as a business need only "occasionally" be engaged in the activities enumerated in the definition. In support of its position, Accuworx relies on *Sullivan and Driedger on the Construction of Statutes* (Fourth ed.), Butterworths, December 2002. In particular, Accuworx relies on the textual analysis set out in Chapter 7 of the text, the presumptions set out therein about how legislation is drafted as well as the maxim of implied exclusion. Accuworx relies on *Re International Union of Operating Engineers, Local 793 v. Graham Bros. Construction Ltd.*, 2005 CanLII 18256 (ON L.R.B.) (May 26, 2005) in contrasting "primarily" with "occasionally."

16. Beyond the issue of statutory interpretation referenced in the paragraph above, Accuworx submits that the Board should give consideration to how Accuworx's work increases the value of the property on which it engages in such work, when making a determination as to what is construction. In support of this position counsel for Accuworx relies on caselaw interpreting the *Construction Lien Act*, R.S.O. 1990, c C.30 ("CLA"). In particular, Accuworx relies on *Park Contractors* v. *Royal Bank* 38 O.R. (3rd) 290 (O.C.J.) and *310 Waste Ltd.* v. *Casboro Industries Ltd.* 71 O.R. (3rd) 732 (O.C.J), affirmed on appeal in 79 O.R. (3rd) 75 (O.S. J.). In the former case, the work performed restored an industrial plant's "usability." Accuworx submits that such work is construction and not "maintenance." In the latter case, Accuworx argues that "improvement" and "construction industry" are properly equated, and that as such by analogy the interpretation of the terms "altering or repairing" in the CLA are properly considered when considering the meaning of these terms in the definition of construction industry in the Regulation.

17. In addition, Accuworx relies on the distinction drawn between "maintenance" and "repair" made in *Re Stearns Catalytic* E.S.C. 2166 (September 3, 1986). It states that the case stands for the proposition that "maintenance has to do with preserving the functioning of a system, while repair involves restoration of a system to a functional state." Applied to the facts before the Board, Accuworx submits that whether Accuworx employees were "unclogging" gas lines at the Stelco plant or engaging in a similar activity at another industrial site, in so doing, Accuworx is not "keeping the system running" but rather "getting the machine up and running again." This work is therefore "repair" rather than "maintenance" work.

18. Similarly, when a tanker rolls over on a highway, or a train derails, as a result of which there is a spill of contaminant in the surrounding land (or river), the highway (or rail line) system no longer operates. In removing the contaminant, as Accuworx does, the activity by which the highway system is restored to a functional state is "repair" rather than "maintenance." In this latter example, since contaminated soil is inevitably removed from the site as part of this process, the site is also "altered."

19. With respect to the issue of evidence before the Board, Accuworx points out that the only evidence before the Board was that evidence which it adduced. Counsel for Accuworx reminds the Board that the inspector who issued the Order to Comply was not called as a witness on behalf of the Director. In these circumstances, counsel for Accuworx submits that there is "nothing before the Board other than evidence that Accuworx was engaged in a business in the construction industry." In support of its submission counsel relies on *Dusty Miller Landscaping Ltd. v. Gallant*, Can LII 9030 (ON L.R.B), February 9, 2004, where the only evidence adduced was that of the applicant. In the *Dusty Miller* case, the Board held that on the only evidence before it, the applicant was a "construction employer."

20. Lastly, Accuworx submits that the onus is on the Ministry of Labour, who issued the Order to Comply, to show that the employees of Accuworx are non-construction employees and therefore not exempt from the hours of work provisions of the Act. In making this submission, counsel for Accuworx refers to an excerpt from *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.R. [1992] 1 S.C.R. 986, cited in *A.A. Waters & Brookes v. Lachini*, CanLII 13736 (ON L.R.B.), September 26, 2001. Counsel submits that the Regulation is part of the scheme of the Act and is not properly characterized as an "exemption."

Position of the Director of Employment Standards

21. The Director submits that Accuworx is an industrial and environmental clean-up business and that it is not a business in the construction industry. The Director submits that the evidence presented to the Board demonstrates that the work of Accuworx is properly divided into four categories: 1) vacuuming up road side and rails side spills 2) vacuuming up waste at industrial sites, which may or may not be prior to repair 3) excavating at construction sites and 4) pressure washing and cleaning at industrial sites.

22. With the exception of the excavation work Accuworx undertakes at construction sites, which was reflected in the evidence to amount to 1% to 2% of Accuworx's business, and its power washing services, which on the Director's review of the 2007 work orders comprises up to 25% of Accuworx's business, the Director submits that the rest of the work undertaken by Accuworx falls into the category of industrial or environmental clean up.

23. The Director references the definition of construction industry in the Regulation and points out that in order to be covered by the exemption several conditions have to be met. First, the business must be engaged in doing one of the five enumerated activities in the definition, namely "constructing, altering, decorating, or repairing or demolishing." Despite Accuworx's contention that it engages in the activities of "repairing" or "altering," the Director submits that the work undertaken, with the exception of category 3) above, is properly characterized as "maintenance." Secondly, the Director submits that Accuworx must carry out the activities of "repairing" or "altering" on buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or "other works" at the site.

24. The Director points out that the distinction drawn between "repair" and "maintenance" - the latter term being excluded from the activities in the definition of construction industry in the Regulation - has been canvassed by the Board jurisprudence. (See *Re Matcom Industrial Installation Inc.*, [1994] OESAD No. 237 (May 24, 1994) and *Beaver Engineering Limited* E.S.C. 1840 (April 26, 1985). The Director, like Accuworx, references the *Stearns Catalytic* case.

25. Unlike Accuworx, however, the Director contends that looking at whether a system is operating or not to make a determination as to whether the work is "repair" or "maintenance," is insufficient. Rather, it submits that some forms of repair, what it characterizes as "lesser repair" can be maintenance. The Director explains, for example, if a car engine needs to be replaced, this would constitute "repair." However, if a fuel hose has a hole such that the hose needs to be replaced this would be "maintenance." In both circumstances the car would have broken down, yet, in the Director's submission, the lesser repair of the fuel hose replacement would more properly be characterized as "maintenance." Likewise, in applying a similar analogy to Accuworx's unclogging blockages in gas lines, the Director characterizes such work as analogous to that of a plumber unclogging a drain – which is "maintenance" work.

26. The other activity that Accuworx argued it engaged in was "altering." The Director submits that the activities engaged in by Accuworx do not amount to this enumerated activity. In respect of this submission, the Director relies on *Relamping Services Canada Limited v Universal Retrofit Inc and Frank Tancredi*, CanLII 3067 (ON L.R.B), February 9, 2005. In that case, the Board determined that "alteration" in the context of construction work meant something other than the plain definition of "alter." The Director points out that the Board held that work, such as rearranging

furniture, may involve an alteration but does not constitute construction work as "it does not involve an element of a building that is integral or affixed to it." The Director maintains that at no point in its work is Accuworx changing or modifying "an element of a building that is affixed to it."

27. Beyond the enumerated activities, the Director submits that any activity engaged in must be carried out on the nouns or objects referenced in the definition of construction industry. In particular, the Director states that since Accuworx did not do work on "buildings, structures, roads, sewers, water or gas mains, pipe lines tunnels, bridges or canals," it must establish that it carries out the activity of repairing or altering "other works at the site." The Director relies on *Re Hyde*, [1996] OESAD No. 223 (October 4, 1996) in support of the proposition that to be captured by the enumerated list, the object that is sought to be included in "other works" must be a logical extension of the list. The Director contends that "land" in cases of road or rail side spills is not such a logical extension.

28. Contrary to what was submitted by Accuworx as to the amount of time a business needs to be engaged in the activities set out in the Regulation for the exemption to be triggered, the Director submits that the Board jurisprudence has consistently used language that the majority of the employer's work must be within the "construction industry" to be exempt. The Director relies on the *Stearns Catalytic* case, *supra*, as well as *Re Matcom Industrial Installation Inc., supra*, *Responsive Multi-Tech Services Ltd.*, [2007] OESAD No. 627 (July 24, 2007) and the *Employment Standards Act 2000 Policy and Interpretation Manual* (Toronto: Thomson and Carswell, 2006), Chapter 31.5.1 (relating to the "landscape gardener" exemption in section 4(2)(a) of the Regulation).

29. Moreover, the Director points out that to adopt Accuworx's position on this issue would be contrary to the remedial nature of the Act and the principle that exemptions should be construed narrowly (see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; *Re Blais*, [1995] OESAD No. 31, April 19, 1995).

30. Applied to the facts before the Board, the Director's position is that the 3rd and 4th categories of Accuworx's work the Director references in paragraph 21 above represent a minority of Accuworx's work. The Director argues that should the Board conclude that the 1st and 2nd categories or a portion of either category of work not to be work within the construction industry, Accuworx cannot be held to be a construction industry business within the Regulation.

31. In response to the statutory interpretation argument made by Accuworx, the Director points out that the interpretation offered by Accuworx is one of several interpretive conclusions that could be drawn from the language in the definition section of the Regulation. In addition, the Director directs the Board to the problems set out in the referenced text with the "presumption of consistent expression," namely that it does not "necessarily reflect the realities of legislative drafting" and must be weighed against the competing consideration of the purpose of the Act. The Director further notes that with respect to the presumption of "implied exclusion," the definition section of the Regulation fails to observe a pattern in the wording of the definitions in section 1 of the Regulation but rather each definition uses its own unique language. Lastly, the Director refers the Board to the "presumption against implicit alteration of law" from the *Sullivan* text, *supra*, in support of its submission that the legislature did not intend to depart from the established jurisprudence relating to the majoritarian threshold despite the absence of "primarily" in the definitions of construction employee or construction industry.

32. The Director submits that cases that interpret the terms "repair" and "alter" in the CLA context to support Accuworx's position that it is a "construction industry" business are irrelevant. In support of its position, the Director relies on *Bajor v. Ontario Labour Relations Board*, [2008] O.J. No. 2970 (July 28, 2008) and *Champeau v. Canada*, [2001] T.C.J. No 104 (January 23, 2001). The Director further points out that the purposes of the CLA and the Act are fundamentally different and that the language in each act does not mirror the other.

33. In response to Accuworx's submission that the onus is on the Ministry of Labour to demonstrate that the employees of Accuworx are non-construction, the Director's position is that in applications under section 116 of the Act, the Board has consistently held that it is the applicant who bears the onus. The Director provided the Board with numerous cases to support its position in this regard.

Decision

34. As stated at the outset of this decision, the issue to be decided is whether or not the employees of Accuworx are construction employees as defined in Section 1 of the Regulation. That is to say are Accuworx employees employed at the site in any of the activities described in the definition of construction industry?

35. For the reasons that follow, the Board has determined that Accuworx employees are not construction employees. Accuworx employees are therefore entitled to the hours of work protections afforded to other non-exempt employees covered by the Act.

Onus

36. Despite Accuworx's submission that the onus is on the Ministry of Labour to demonstrate that Accuworx employees are not construction employees and therefore not exempt from the hours of work provisions in Part VII of the Act, this is not the case. Moreover, the cases referenced to support Accuworx's unusual proposition, namely *Machtinger v. HOJ Industries Ltd., supra*, cited in *A.A. Waters & Brookes v. Lachini, supra*, do no such thing.

37. In this case Accuworx is seeking to have an exemption invoked to have an Order to Comply with the hours of the work provisions of the Act set aside. It is the party seeking to invoke an exemption – in this case that party is also the applicant - who must, on the balance of probabilities, persuade the Board, based on the evidence adduced at the hearing, that its employees are construction employees and therefore fall within what is properly construed as an "exemption" to the Act as set out in section 4(1)(d) of the Regulation relating to "Exemptions Re Hours of Work and Eating Periods."

Definitional Components for the Applicability of the "construction employee" Exemption

38. Given the language of the definitions of construction employee and construction industry reproduced at the outset of this decision, Accuworx must satisfy the Board that a number of conditions have been met for its employees to fall within the exemption. First, Accuworx employees must be engaged in any one of the following activities: "constructing, altering, decorating, repairing or demolishing." Secondly, Accuworx employees must be doing one of these activities to "buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works." Thirdly, they must undertake any of these activities on the listed objects or nouns "at the site."

39. To address this third component first, there is no dispute that the employees of Accuworx are employed "at the site." The evidence was clear that Accuworx employees, with the exception of its three office employees, are dispatched to primarily industrial and land sites throughout the province. The Board notes that the term "at the site" means "construction site" and it is the determination of whether or not the employees are employed in any of the enumerated activities to the nouns or objects from the list in the definition of construction industry that dictates whether or not the "site" is a "construction site."

40. In respect of the first definitional component, namely the activities in which Accuworx employees are engaged, only "repairing" and "altering" were put to the Board for its consideration by the parties.

Are Accuworx employees engaged in "altering" or "repairing"?

41. The Board must determine whether or not Accuworx employees are engaging in the activities of "repairing" or "altering" when they undertake the work for which Accuworx contracts its services. The parties agreed that relevant to this determination is the jurisprudence that draws a distinction between "repair" and "maintenance." Throughout the hearing, Mr. Rosset and his counsel referred to the work of Accuworx by the hands of its employees as "repair" whereas the Director argued that the work is more properly characterized as "maintenance."

42. Both parties cited the case of *Re Stearns Catalytic, supra,* in support of their respective positions. The oft quoted excerpt from the case bears repeating:

> "Maintenance" and "repair" are not synonymous terms. They have an area of overlap, but in normal usage each also covers an area of activity which the other does not. Maintenance has to do with preserving the functioning of a system, while repair involves restoration of a system to a functional state. Lesser breakdowns in a system may require repair which could also be called maintenance since, viewed more broadly, the system is being preserved. Greater breakdowns, however, will tend to require repair which goes beyond the normal idea of maintenance. Maintenance, on the other hand, may involve functions such as cleaning or adjusting where there is really no breakdown to be repaired..."

43. The framework for assessing whether or not the work of Accuworx employees is "repair" or "maintenance" was also distilled by Referee Franks when he considered the distinction between the terms found in *Master Insulators Association Inc.*, [1980] O.L.R.B. Rep. Oct. 1477 in *Beaver Engineering Limited, supra*, where the Board had written:

> In the context of the work affected by this complaint "maintenance" is difficult to distinguish from "repair". In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function economically, such work is repair work. "Maintenance" and "repair" work are not mutually exclusive concepts and lack of adequate maintenance will surely produce a situation where repair becomes inevitable.

44. In *Re Matcom Industrial Installation Inc., supra*, Referee Kaufmann referenced Referee Franks decision and characterized the decision as follows:

> He found on the evidence that some of the claimants' work had indeed been repair, but that at other times their work was "designed to restore the system to its normal efficiency" and at still other times was spent on 'service matters such as washing down and cleaning units": supra, pp.10-11. He defined maintenance work as "work designed to make the system run at its proper efficiency" and determined that because the claimants spent the majority of their time in maintenance and service work, they were not exempt under s. 2(e) from s. 40.

45. It is the specific facts of a case, as adduced through evidence and measured against this framework that lead the Board to its determination as to whether or not the work engaged in by employees is properly characterized as "repair" or "maintenance" for the purpose of the Regulation. As such, Accuworx's determination of its employees' hours of work as "man hours repair" or "man hours maintenance" is neither dispositive nor even relevant to the issue of whether or not Accuworx employees are engaging in the activity of "repair." The Board gives no weight to the conclusions drawn by Mr. Rosset in the tables prepared by him for the purposes of the hearing and tendered as part of bound work order volumes for 2007.

46. The different kinds of work engaged in by Accuworx employees vary depending on the nature of Accuworx's contracts for service. The nature of "typical" work situations was broken down in the facts section of this decision. As set out in that section, the evidence before the Board is that 35% to 70% of Accuworx's work – which is one and the same as its employees' work - varying month to month, relates to its response to spills, be they spills on highways, rail sides or in the industrial setting. "Pretty much the balance" of Accuworx's work (which Mr. Rosset also estimated to be between 35% to 70%) related to "repair" or "clean up" work, depending on one's characterization of it, in response to machines or systems that had stopped functioning or had broken down in the industrial setting.

47. The Board appreciates what counsel for Accuworx acknowledged as "one or two inconsistencies" relating to the percentages allocated by Mr. Rosset to the types of work engaged in by Accuworx employees. Cognizant of them, the Board now turns to its assessment of the characterization of the two most significant types of work engaged in by Accuworx employees as adduced through evidence at the hearing.

Roadside/Railside Spills and Spills More Generally

48. One clearly defined area of Accuworx's work is its dispatch of employees to "remediate" sites at roadside or railside spills. Employees do the same work, where they vacuum up material at industrial sites. In the former case, depending on the size of the spill and the location of the accident or derailment, and the time of year that these unpredicted incidents occur, there may be varying degrees of soil, grass, and/or snow that is vacuumed into Accuworx's trucks, together with spill material (contaminated or not), which material is then transported off site. Where the spill extends to a water surface, Accuworx employees may use their expertise and equipment to skim the water surface or otherwise ensure the removal of a contaminant from the water. In the case of industrial spills, from leaks in systems or equipment, depending on the nature of the material and the industrial site in question, once vacuumed up, the material may or may not be transported off site.

49. Counsel for Accuworx articulated that within the repair/maintenance paradigm, in the context of a roadside or railside spills, where a vehicle or train is involved, the "system" - be it the road or highway or railroad - may be shut down. That is to say the highway or railway system may be "closed" to other vehicles/trains. Likewise, when spills occur at industrial sites, this may or may not have an effect on production, depending on the size and area of the spill. Accuworx argues that by removing the contaminant (or other non hazardous material) from the surrounding spill area, by vacuuming the material into its trucks, Accuworx employees are "restoring the highway/road/rail/or other operational system to a functional state" rather than "preserving the system."

50. The Board does not accept that Accuworx employees, when they remove a contaminant or other material from the area surrounding a spill, are engaging in "repair" work. Nor do they engage in "repair" work when they remove a spilled contaminant or non-hazardous material at an industrial site (like at Stelco Inc., Redpath Sugar Inc. or Husky Injections Molding Systems Ltd.). Accuworx employees are engaging in environmental clean up work when they vacuum up contaminated material. They are engaging in clean-up work when they vacuum up other non-contaminated material. Conceptually, counsel for Accuworx has framed the cleaning up of a spill and the removal of the contaminant as "restoring the highway/road/rail system" (or other operational system in the industrial setting). However, such a global conceptualization of the work is a misapplication of the repair/maintenance paradigm that has evolved in the jurisprudence.

51. The work of vacuuming up spilled contaminants or non-hazardous material and "remediating the site" is not about "the system" at all. There is no nexus between the work undertaken and the "system" that is characterized by Accuworx as being "restored" or arguably "preserved." While it is true that trucks/trains tend to spill contaminants where they travel, namely on highways/roads or rail lines, the "transportation systems" where the spills invariably occur are incidental to the purpose of the work. Similarly, whether or not operational systems continue to function (are closed or not) in the industrial setting is incidental to the purpose of Accuworx's spill clean up work. To frame the nature of the work in the language of the repair/maintenance paradigm, it is not designed to "restore or preserve any system" or "to make any system function at its proper efficiency." The work is designed to clean up the spill.

52. To illustrate the point, if a contaminant (or other material) spills in a field, the nature of Accuworx employees' work is the same as the nature of their work on a road or rail side or river side or industrial plant – but there is no "system" that attaches to the work. The employees' work is designed to clean up, more often than not, a contaminant that threatens the environment, whether natural or industrial, into which the contaminant (or other material) has inadvertently spilled. Likewise, the fact that soil (or water) is inevitably removed as part of the process of removing the contaminant (or other material) from a land/rail or river spill site, does not mean that the activity engaged in is "altering" as construed in the Regulation, as its removal is also incidental to the purpose of the work.

53. Another example may serve to illustrate this point. When an automobile accident occurs at an intersection, or on a highway, the roads or highway affected by the debris from broken cars and possibly injured people may very well shut down the "road system" for a period of time. Those employees who are employed in removing the debris from the site so that it might be opened again (thereby returning the road system to its former functional state) cannot be said to be engaged in "repairing" or "altering" anything. This is because there is no nexus between the work of employees responsible for the accident clean up and the roads or highway systems. If, however, a lamp post is

struck down in the context of the accident, those employees who undertake the work required to get the road lamp functional again may be engaged in the activity of repairing as reflected in the definition of construction industry in the Regulation.

54. For the reasons set out above, spill response, no matter where it takes place, does not fall within the "repair/maintenance" paradigm that has evolved in the relevant jurisprudence.

55. The Board notes that the analysis set out above and relating to environmental clean up (or simply clean up) of spills applies equally to Accuworx employees' work when after a fire Accuworx is contracted to remove chemical drums at a site and/or vacuum up flooded fire water that may or may not threaten to make its way into the local environment. To reiterate, there is no nexus to a system to be restored or preserved.

56. Beyond the maintenance/repair paradigm referred to by both parties in argument in support of their respective positions, Accuworx submitted that the Board should consider jurisprudence relating to the CLA, and in particular consider how the work of Accuworx increases the value of the property on which it engages in its work in making a determination as to what is construction. Accuworx also invites the Board to import a judicial analysis stemming from a determination that removing an environmental contaminant from a property's surface constitutes a "repair" to land, thereby "improving" it with the result verifying that that a waste removal company was entitled to lien under the CLA. The Board will not do so.

57. At issue in the *Park* case was the priority between an existing mortgage and a construction lien for remedial work undertaken by Park Contractors at a metal plating plant. The court determined that the contractor, who had undertaken the environmental clean up work, in so doing gave value to the property. Under the priorities provisions in Part IX of the CLA the contractor was found to have priority over the mortgage.

58. In *310 Waste Co., supra*, a waste removal company had removed "hundreds of thousands of tires" from an illegal dumpsite. The court found that the company had "altered" and "repaired" the land in question. Removing the "contaminant" was found to be an improvement as defined in s 1(1) of the CLA. This case was contrasted by counsel for Accuworx with *G. Newman Aluminum Sales Ltd.* v. *Snowking Enterprises Inc* (1980), 13 R.P.R. 275, where removing snow did not enhance the value of the land, and therefore the work undertaken was not to be considered an "improvement" as contemplated by the then applicable *Mechanics' Lien Act*, R.S.O. 1970, 1970, c. 267.

59. In the latter case cited by counsel for Accuworx, the relevant provisions of the CLA considered by the court are:

> **Creation of a Lien**
>
> 14 (1) A person who supplies services or material to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

Section 1(1) of the CLA defines improvement as follows:

> 1 (1) In this Act,

> "improvement" means,
>
> (a) any alteration, addition or repair to, or
>
> (b) any construction, erection or installation on,
>
> any land, and includes the demolition or removal of any building, structure, or works or part thereof, and "improved" has a corresponding meaning.

60. The Board would be misguided were it to import the judicial analysis considering the interpretation of "repair" for the purposes of determining whether there had been an "improvement" set out in section 1 of the CLA to the interpretation of "repair" in the definition of "construction industry" set out in the Regulation of the Act. The Board appreciates the court's rationale when it determined that the removal of thousands of tires from what had become an illegal tire dump was considered a repair or alteration to land for the purpose of interpreting "improvement" under the CLA, however, that analysis under the CLA cannot be imported to the Act the Board is charged with interpreting here.

61. This is so because the CLA and the Act have different objects and their respective legislative schemes are unrelated. The CLA is designed to ensure the financial integrity of a series of contracts and subcontracts entered into to ensure the completion of a project whereby there has been an improvement to land as defined in that act. It creates a series of purely statutory financial obligations on all of the participants which obligations ensure some measure of payment for services rendered by those lower down in the contracting chain by those higher up in the same chain, despite the absence of any privity of contract between those parties. It does not purport to regulate the content or the performance of any one contract. The *Employment Standards Act, 2000* is benefits conferring legislation, broadly premised on the need to protect employees. This premise stems from the inherent imbalance in bargaining power between employers and employees. Its object is to provide minimum standards and to protect the interests of employees, including those provisions relating to limits on hours an employer can require or permit an employee to work. These acts have completely different objects, their legislative schemes are unrelated as are the policy considerations that inform them. Likewise and for the same reasons, how work undertaken increases the value of property is an irrelevant consideration to the issue before the Board in this case.

Non-Spill Work in the Industrial Setting

62. Other typical situations in which Accuworx is contracted to perform services take place primarily in the industrial setting. Two examples of such situations related to employees charged with unclogging a filter tank at a water treatment plant in Etobicoke, and with unclogging solidified gas lines at Stelco Inc. In the former case, there had been black carbon solid built up in a filter tank and Accuworx employees entered the confined space of the tank, assessed it for hazards, and ultimately used high volume water and air chippers to break down the carbon. They vacuumed the material into the trucks. As a result of the blockage in this particular example, the tank was not in service. In the case at Stelco Inc., and similarly at other industrial sites, as a result of solidified material in a pipe (a gas pipe at the Stelco plant), the pipe was no longer able to transport fuel.

63. Relying on the distinction drawn between maintenance and repair made in *Re Stearns Catalytic* E.S.C. 2166 Accuworx argues that when its employees are "unclogging" gas lines at the Stelco plant or engaging in an activity such as that described at the water treatment plant in Etobicoke, in so doing, they are not "keeping the system running" but rather are "getting the machine

up and running again." This work, Accuworx therefore argues, is "repair" rather than "maintenance" work.

64. The Board does not accept Accuworx's characterization of the activity of unclogging pipes, or the breaking down of solid carbon build up in a tank and subsequent removal of the carbon through a vacuum line for disposal to be "repair." It is true that if a pipe is completely clogged with deposits or a water tank is not in service because of a similar development in the tank "the system is not running." However, the system or equipment's failure to be operational does not dictate that the activity undertaken to render the system or equipment operational again is "repair." Although counsel for Accuworx would have the Board find that the analysis is that simple, the jurisprudence referenced in paragraphs 42 through 44 of this decision suggests that it is not.

65. The work undertaken by Accuworx employees was neither an addition nor a subtraction to "the system" or equipment however defined. The gas pipe at Stelco Inc. that was used to transport fuel remained intact - there was nothing wrong with it *per se*. Fuel could not pass through the pipe because of an obstruction, that obstruction being the build up of solidified material. This material had to be removed to allow the movement of fuel through the pipe to resume – that is for the system to be restored to run at its proper or normal efficiency. This is "maintenance" in the repair/maintenance paradigm as the system/equipment is preserved and nothing is repaired. To use the language referred to in the *Stearns Catalytic* case, *supra*, "there is really no breakdown to be repaired." This analysis applies to the many examples of contracts undertaken by Accuworx whereby its employees remove obstructions in lines or pipes and/or tanks.

66. On a similar analysis, the activity undertaken by Accuworx employees at Pearson airport and described in detail by Mr. Rosset at the hearing is not properly characterized as repair. In the Pearson airport example, the Board appreciates that Accuworx employees entered into underground confined space, that specialized equipment was used, that lock out of electricity was affected and that the MOE was on site to monitor the situation. However, Accuworx employees' work was to empty two massive underground stormwater tanks (containing millions of gallons of material) that had become contaminated. Accuworx employees then sanitized the tanks.

67. This work described by Mr. Rosset is not construction work. It matters not that the undertaking was massive, that the work was unscheduled, that certain equipment was rented to execute the undertaking, or that employees had undergone certain relevant training to carry out the work. Emptying tanks and sanitizing them is not "repair." As with the non-spill work described above, Accuworx employees neither added nor subtracted from "the system." On the evidence before the Board, the tanks or storm water management system itself remained intact. Although Accuworx employees' undertaking was essential to get the system working again, which the Board understood to have impacted on whether certain runways could be used for a period of time, the work of Accuworx employees was undertaken to restore the operation of the system to its proper or normal efficiency. This work is maintenance work.

Time Threshold

68. As mentioned earlier in this decision, throughout the hearing, counsel for Accuworx emphasized its position that Accuworx employees need only engage in any of the five activities in the definition of construction industry "for any part" of their time, to be captured by the Regulation.

69. Were the Board to accept Accuworx's proposed time threshold that the employees of Accuworx need only engage in any of the enumerated activities in the definition of construction industry "for any part of their time," since Accuworx employees perform work that is clearly residential or other commercial construction work 1% to 2% of the time, Accuworx would have met the applicable threshold for the amount of time an employee must engage in the activities to be captured by the exemption. The Board also notes that certain work orders, although not explored individually in any significant way at the hearing, might also be construction work.

70. The Board has no hesitation in determining that Accuworx's statutory interpretation argument relating to the amount of time its employees must spend engaging in the enumerated activities listed in the definition of construction industry cannot be sustained for the reasons that follow.

71. To support its position, Accuworx relies on a statutory interpretation argument based on a textual analysis and stemming from the absence of the word "primarily" in the definitions of "construction employee" and "construction industry." Accuworx's position is based on the fact that the definition of an "information technology professional" in the definitions section of the Regulation is qualified by the term "primarily" in reference to that professional being engaged in certain activities. Counsel for Accuworx points to the following presumptions about how legislation is drafted: presumed knowledge and competence, the presumption against tautology as well as the presumption of consistent expression. Accuworx also referenced the maxim of implied exclusion referenced in *Sullivan and Driedger on the Construction of Statutes*, *supra*.

72. First, without considering alternative ways to interpret the absence of the word "primarily" as expressed by the Director in argument, to adopt Accuworx's statutory interpretation argument based on general presumptions of statutory interpretation would fly in the face of the overriding principle of "modern statutory interpretation" set out in *Sullivan and Driedger on the Construction of Statutes*, *supra* and quoted in the *Rizzo* case, *supra* by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

73. As stated earlier in this decision, the Act in this case is benefits conferring legislation that is broadly premised on the need to protect employees and stemming from the inherent imbalance in bargaining power between employers and employees. In this context, a broad and liberal interpretation of the Act requires that any regulation that seeks to limit the applicability of benefits conferred by the Act (such as limits on hours an employer can require or permit an employee to work) be assessed in this legislative context. To interpret "construction employee" as an employed person who engages in any of the enumerated activities for any part of his or her time would lead to an absurd result in the context of the Regulation viewed within the applicable legislative scheme.

74. Moreover, from a statutory interpretation perspective, the Board notes that "information technology professional" was first added as an exempted employee for the purposes of Part VII of the Act in July 2001. The definitions of "construction employee" and "construction industry," were changed at the same time. In so doing, the Board notes that these latter definitions were harmonized with the language of the *Labour Relations Act, 1995*, S.O. 1995, c.1 (as amended). The legislature

was assumed to have knowledge of the Board jurisprudence as it related to the construction industry and those employed in the industry as it was in 2001. That jurisprudence consistently applied the majoritarian threshold test to determine whether employees fall within the exemptions to the minimum standards imposed by the Act. As such, a clear expression of legislative intent would have to be expressed for the Board to adopt Accuworx's position that any part of an employee's time need be spent in the enumerated activities listed in the definition of construction industry to be captured by the Regulation.

75. To succeed in this application Accuworx must therefore demonstrate, on the balance of probabilities, that more than 50% of its employees' work meets the definitional components set out in the definition of construction industry. 35% to 70% of Accuworx's work (and hence its employees' work) is in response to spills, and the Board has found that such work does not fall within the maintenance/repair paradigm. Beyond spill response, typical circumstances upon which Accuworx employees are called upon to work in the industrial setting – examples of which were analyzed within the maintenance/repair paradigm above – are properly characterized as "maintenance" and not "repair" work. This also amounts to 35% to 70% of Accuworx's work. On its own evidence, therefore, Accuworx fails to meet the requisite threshold on the balance of probabilities.

76. Since Accuworx has fallen short of establishing that more than 50% of its employees' time is spent engaging in any of the five activities enumerated in the first definitional component for an employee to be found to be a construction employee in the Regulation, no analysis in respect of the second definitional component, namely whether or not any of the activities is to "buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnel, bridges, canals or other works" is necessary, and the Board declines to engage in that analysis here.

77. This application for review is dismissed and the Order to Comply is affirmed.

0390-09-ES A.J. Lanzarotta Wholesale Fruit & Vegetables Ltd., Applicant v. James Blair, and Director of Employment Standards, Responding Parties

Employment Standards – The employer sought review of an Order to Pay requiring it to make good on an unauthorized deduction from the employee's last pay cheque – The employer's uncontested evidence at the hearing showed that the employee had previously entered into a series of loan arrangements with his employer, and each had been properly authorized for re-payment – The final loan agreement was made in haste, without written acknowledgement for re-payment – The Board found that the cheque issued to the employee was marked as a "loan" on its face – By endorsing the cheque, the employee had provided written authorization for the re-payment, so the deduction from the employee's final pay was valid – Application granted

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Debbie Fitzsimmons* for the applicant; no one appearing for either of the responding parties.

DECISION OF THE BOARD: September 30, 2009

1. This is an employer application under the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended ("the Act") for review of Order to Pay No. 26746.

2. The hearing in this matter was scheduled for September 16, 2009 commencing at 9:30 a.m. As neither of the responding parties appeared at the hearing on the date and at the time indicated in the Notice of Hearing, the Board stood down until 10:00 a.m. in the event they were delayed. When the Board reconvened at 10:00 a.m., only the applicant (or "the company") was in attendance, and accordingly the Board commenced to deal with the matter.

3. The Employment Standards Officer ("the Officer") determined that the applicant had made an unauthorized deduction of $500 against the wages owed to James Blair in his final pay cheque, contrary to section 13 of the Act.

4. Section 13 of the Act reads:

> **13.** (1) An employer shall not withhold wages payable to an employee, make a deduction from an employee's wages or cause the employee to return his or her wages to the employer unless authorized to do so under this section.
>
> (2) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them if a statute of Ontario or Canada or a court order authorizes it.
>
> (3) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them with the employee's written authorization.
>
> (4) Subsections (2) and (3) do not apply if the statute, order or written authorization from the employee requires the employer to remit the withheld or deducted wages to a third person and the employer fails to do so.
>
> (5) Subsection (3) does not apply if,
>
> (a) the employee's authorization does not refer to a specific amount or provide a formula from which a specific amount may be calculated;
>
> (b) the employee's wages were withheld, deducted or required to be returned,
>
> (i) because of faulty work,
>
> (ii) because the employer had a cash shortage, lost property or had property stolen and a person other than the employee had access to the cash or property, or

(iii) under any prescribed conditions; or

(c) the employee's wages were required to be returned and those wages were the subject of an order under this Act.

5. Debbie Fitzsimmons, the applicant's bookkeeper, testified on behalf of the applicant. She pointed out that Mr. Blair had entered into a series of loans with the applicant over the course of his employment. Documents submitted with the application confirm the existence of six such loans, the terms of which were reduced to written agreements between Mr. Blair and the applicant. All of the six written agreements specified the amount of the loan as well as the schedule and amount of the repayments to be made by payroll deduction from Mr. Blair's wages. In addition, five of the six loan agreements specified that, in the event of Mr. Blair's termination of employment, the applicant would be entitled to deduct any balance owing from Mr. Blair's final pay cheque. The only written agreement that did not contain such a proviso pertained to a loan of $300 made to Mr. Blair on or about June 20, 2006 that specified repayment in full on June 22, 2006.

6. On November 1, 2007, Mr. Blair met with the company's principal, Gus Lanzarotta. Ms. Fitzsimmons was not a participant in the meeting, but after its conclusion, she prepared a cheque in the amount of $500 for Mr. Blair bearing the subject line, "Personal Loan". (I note that the same subject line appears on two copies of cheques provided by the applicant to the Board in respect of the first two loans made to Mr. Blair in November 2004 and March 2005.) But because Mr. Blair was in a hurry to leave, the usual loan paperwork was not prepared or signed. The preparation and signing of the loan agreement was put off in anticipation that it would be completed at some point later when Mr. Blair was present in the workplace. However, Mr. Blair never worked another shift for the applicant. He was terminated a few days after his meeting with Mr. Lanzarotta, for reasons that need not be set out here. The loan agreement, therefore, was never signed by either party. However, it was Ms. Fitzsimmons' evidence that Mr. Blair placed his signature on the $500 cheque.

7. Ms. Fitzsimmons argued that, in light of the previous loan agreements which clearly spelled out the consequences upon termination of employment, and in light of her insertion of the words "Personal Loan" on the $500 cheque, the applicant did not make an unlawful deduction and ought not to be subject to an order to pay anything to Mr. Blair. She also stated that Mr. Blair's absence at the hearing in this matter is confirmation that he realizes this to be the case.

8. Subsection 13(3) makes clear that the only circumstances under which an employer may make or withhold a deduction or cause the return of earned wages, absent a statutory foundation or a court order, is with the employee's written authorization. The purpose behind the provision is to prevent an employer from gaining unchecked access to an employee's wages to satisfy debts or other obligations an employer perceives the employee may owe or have undertaken.

9. The applicant entered into several written loan agreements with Mr. Blair over the course of his employment. Except where repayment was contemplated to be made within days of the loan, Mr. Blair agreed, in all of the previous written transactions, that, in the event of his termination, the employer was entitled to offset or deduct the loan balance from his final pay. A clear pattern was established in the lending process concerning the contingency of termination of employment.

10. Having concluded the negotiations for the final $500 loan, Mr. Blair was eager to leave the workplace before the paperwork could be finalized. I have little doubt that he would gladly have signed a similar agreement for the $500 loan had events unfolded in a more predictable manner, and Mr. Blair had remained employed with the applicant for some longer period of time. And I do not think the failure of the company to obtain his signature on a similar loan agreement leads to the conclusion that Mr. Blair did not provide his written authorization. As the Board noted in *1322396 Ontario Inc.*, [2006] O.E.S.A.D. No. 261 (March 16, 2006), section 13 does not set out any particular form that a written authorization must take. In that case, a mere annotation by the employee on receipts for goods purchased by the employee on credit from the employer was found to be sufficient written authorization justifying a deduction from wages. Similarly, in the case before me, I find that Mr. Blair provided his written authorization when he signed the cheque bearing the words "Personal Loan". By signing the $500 cheque marked "Personal Loan", I infer that Mr. Blair was agreeing to the same term he had agreed to on several previous occasions concerning the recovery of the loan's balance upon termination.

11. I take nothing of significance from Mr. Blair's decision not to participate in the hearing. He was not compelled to do so, and it is the applicant who bore the burden of proving that no wages were owing to Mr. Blair. It discharged that burden on the basis of its own uncontradicted evidence.

12. For these reasons, I rescind the order to pay.

13. The Director of Employment Standards is hereby directed to return to the applicant the monies paid in trust, together with any interest that may have accrued.

2356-06-R Labourers International Union of North America, Ontario Provincial District Council, Applicant v. **Aramark Canada Facilities Services Limited**, Responding Party

Certification – Construction Industry – Employer – The union sought to certify the employees of Aramark who were at work at a construction site on the date of application – The employer argued that it was not a construction employer and the cleaning of trailers its employees were engaged in for one of its clients (Shell Canada) was not work in the construction industry – Each contractor working on the site during the plant shutdown was required to provide its own trailer and washroom facilities (and was responsible for their cleaning) – The Board found that although there was construction work being carried out at the site, and the Shell-owned trailers were accessible to construction workers, the employer is a janitorial and cleaning contractor and its employees were not performing construction work – Application dismissed

BEFORE: *Harry Freedman*, Vice-Chair.

APPEARANCES: *Carolyn Hart* and *Victor Horvath* appeared for the applicant; *James G. Knight, Stephen Leonoff* and *Tim Phalen* appeared for the responding party.

DECISION OF THE BOARD: September 23, 2009

1. The Board by decision dated September 20, 2007 (unreported, 2007 CanLII 39345) in this application for certification made pursuant to the construction industry provisions of the *Labour Relations Act, 1995,* S.O. 1995, c 1 as am., (the "Act") set out the nature of the issue in dispute and set out some of the factual context relevant to a determination of this matter.

2. The responding party asserts it is not an employer in the construction industry and submits the employees the applicant seeks to represent were not employed in the construction industry.

3. The Board in that September 20th decision noted the parties wished to litigate this issue on the basis of an agreed statement of facts to avoid the need to call evidence and provide comprehensive submissions on the issue in dispute. That decision also outlined the essential facts and the Board's understanding of the legal principles to assist the parties in the preparation of their material and submissions.

4. When the hearing reconvened before me, the parties agreed the correct name of the employer of the employees affected by this application is Aramark Canada Facilities Services Limited ("Aramark"). Therefore, the name of the responding party is amended to reflect the parties' agreement.

5. The Board wrote in its September 20, 2007 decision:

> 2. ... The applicant claims the employees it seeks to represent were performing work in the construction industry on the day the application was filed. The applicant acknowledges the responding party applied the collective agreement between Labourers' International Union of North America, Local 1089 ("Local 1089") and the responding party to the employees who are the subject of this application, but claims that since the work they were doing was work in the construction industry, the collective agreement, which, according to the applicant, applies to the employees of the responding party when they are performing cleaning and other work falling outside the construction industry, does not and cannot apply to such employees when they are employed in the construction industry doing construction industry work.
>
> 3. The applicant pointed out that both it and Local 1089 are affiliated bargaining agents within the meaning of section 151(1) of the Act, and therefore cannot enter into a collective agreement or other arrangement in respect of construction work in the industrial, commercial and institutional sector of the construction industry except a "provincial agreement". The applicant contends the work performed by the responding party on the application date was work in the construction industry that would be clearly within the industrial, commercial and institutional sector and therefore, by reason of section 162(2) of the Act, the only collective agreement that could lawfully apply in respect of such work and the employees performing that work was the Labourers' ICI provincial agreement.
>
> 4. The applicant accepts that if employees it seeks to represent were not working within the construction industry on the application date, this application would be untimely and would have to be dismissed.
>
> ...

7. The responding party is a national food and cleaning services provider that provides, among many other services, cleaning services to industrial facilities. One of its clients in the Sarnia area is Shell Canada Limited. It provides building maintenance and janitorial cleaning services at the Shell Canada refinery in Corunna.

8. As an element of its contract with Shell Canada, the responding party undertakes the cleaning of on site trailers Shell Canada uses from time to time. On the application date, according to the responding party, the three employees the applicant seeks to represent were engaged in cleaning 12 of 13 trailers located at the Shell Canada refinery property. There were approximately six other Shell Canada trailers but no work was done in them on the application date.

9. The responding party indicated the 13 trailers, all of which were owned by Shell Canada, fell into five categories: five trailers were "blast proof trailers" used by Shell Canada's health and safety employees; two trailers were "temporary inspection trailers" used by Shell Canada inspection employees, two trailers were "maintenance trailers" used by Shell Canada maintenance, inspection and health and safety employees, three washroom trailers, one of which was permanent, all of which were connected to Shell Canada's running water source on site, and one trailer was a permanent planning trailer used by Shell Canada planners and coordinators. (A fourth employee of the responding party did cleaning work at that trailer.) All but the washroom trailers provided office space for use by Shell Canada employees. The three Shell Canada washroom trailers were not restricted to Shell Canada employees. Any employee, including construction tradesmen employed by construction contractors working at the site had access to and used those washroom trailers.

10. At least twelve of Shell's trailers were located in an area of the Shell refinery referred to by the applicant as "trailer city". (It was not clear to me whether the permanent planning trailer was in the vicinity of the other Shell Canada trailers.) As a result of a significant shutdown for some major repairs and construction work at the Shell Canada refinery, several hundred construction employees working for a number of different contractors were on site. Each one of the contractors engaged by Shell Canada was required to have its own trailer or trailers on site. Neither Shell Canada nor the responding party had any responsibility over the cleaning and maintenance of the contractors' trailers. The responding party cleaned and maintained only the trailers owned by Shell Canada. The contractors were responsible for cleaning and maintaining their own trailers and used their own construction labourers for that work.

11. The responding party indicated that it was responsible for cleaning six other trailers at that same site under its arrangement with Shell Canada, but those other six trailers were not cleaned on the application date. It also contended it had employees performing cleaning work at other sites within the geographic area of the proposed bargaining unit, but for other clients (Basell and TransAlta). Those employees working at other than the Shell Canada site were doing office cleaning at its clients' facilities. No construction work was taking place at those other two sites.

12. The applicant contends that the washroom trailers in particular were used by employees engaged in construction activities at the Shell Canada site and were therefore a significant element of the construction projects undertaken at the Shell Canada refinery. The applicant submits that where the responding party is cleaning trailers—whether office, food/cafeteria, or washroom—and those trailers are connected or related to ongoing construction activity, such cleaning work is work that is in the construction industry.

...

14. Although certain kinds of work is invariably work in the construction industry no matter who performs it or how it is performed, see for example *A-1 Hydrant Services Ltd.*, [2005] OLRB Rep. May/June 350 at 356 where the Board wrote:

> ...the cleaning, disinfecting and testing of water mains in a new subdivision before those mains are assumed by the municipality is an element of the construction of those water mains.

there are other circumstances where the same work may or may not be in the construction industry, depending on the context within which the work arises and the identity of the employer responsible for performing that work.

15. In *Ellis Don Limited*, [1993] OLRB Rep. July 594, the Board held that the cleaning work done by Final Touch Maintenance Services at a construction site was construction industry work. The Board wrote at page 594:

> All of the cleanup work, whether done by construction labourers or by employees of Final Touch, was on a construction project, while construction was still continuing. The work of both groups of employees came under the ultimate responsibility of Ellis Don, the general contractor. The work of both groups of employees overlapped in timing and complemented each other. As the cleanup work was the ultimate responsibility of Ellis Don, Ellis Don's supervisors were involved to some degree in overseeing the performance of the work. The degree of direct supervision was obviously much greater where the work was performed by Ellis Don employees. However, Ellis Don supervisors were responsible for giving instructions to Final Touch as to the timing of its work and for inspecting the work during its progress. It would be artificial to characterize some aspects of the cleanup work over which Ellis Don had responsibility as construction industry work, and other aspects of it as outside the construction industry.

16. See also *Magic Maid Cleaning Service*, decision dated July 14, 2006, unreported, Board File No. 3643-05-R, Q.L. cite [2006] OLRD No. 2723. It does not appear from the decision the Board addressed any argument over whether the employer of the employees who were the subject of the application was an employer in the construction industry. See *Ellis Don Limited*, [2004] OLRB Jan./Feb. 56 at 64-65.

17. Nevertheless, clean up of construction debris, although appearing identical to the kind of work that was dealt with in *Ellis Don Limited, supra* and *PHI International Inc.*, [1980] OLRB Dec. 1789, was found by the Board not to be work in the construction industry in *Ming Sun Holdings Inc.*,

[1987] OLRB Rep. Dec. 1585 where that clean up occurred well after the construction activity had ceased and was undertaken by the owner of the building to prepare for future renovations.

18. It is also important to note that merely because work takes place at a construction site does not necessarily mean that such work is work within the construction industry. The delivery of material to a construction site is not work in the construction industry. See *Ethier Sand and Gravel Limited*, [1979] OLRB Rep. May 692; *Four Seasons Drywall*, [1990] OLRB Rep. May 525; *Marel Contractors*, unreported, Board File No. 2172-00-G, decision dated October 18, 2001, Q.L. cite [2001] OLRD No. 4154 and *Ellis Don Limited.*, [2004] OLRB Rep. January/February 56. That is the case despite some of the work performed by the persons doing the delivery of the material being similar, if not identical, to work done by employees in the construction industry. In *Ellis Don Limited, supra*, the Board noted the ready mix drivers were required to mix ingredients, pour concrete into forms and wash chutes, but held that such work was integral to the delivery of the material. The Board wrote at page 67:

> ...the definition of construction industry focuses on the activity of the operations engaged in rather than that of the employees. In determining whether the drivers in question are engaged in construction work consideration must be given to whether their activities are an integral and necessary part of a construction business.

Similarly, in *Four Seasons Drywall, supra* the Board found that the delivery of drywall to a construction site by employees of a drywall supplier was not work in the construction industry notwithstanding that the employees in question performed a significant amount of activity on the construction site. Those activities include the use of a boom truck to load the drywall to the fifth floor of the building where they stockpiled the drywall. It seems if the work done by the drivers in the *Ellis Don Limited* and *Four Seasons Drywall* cases had been performed by employees of an employer who was otherwise in the construction industry, such work and the employees doing that work would come within the construction industry. As the Board noted in *A-1 Hydrant Services Limited, supra* at page 355:

> ...the appropriate approach is to focus on both the work being done and the context in which that work is done.

6. The Board noted at paragraph 13 of its September 20th decision the applicant acknowledged it would be required to establish the facts on which it would rely to demonstrate that the responding party's employees were working in the construction industry on the date this application was filed. Doing so would require the applicant to prove the nature of the construction activity taking place at the site and to demonstrate the relationship between that construction activity and the activity at the trailers requiring cleaning, as well as dealing with the question of whether the responding party was an employer in the construction industry on the application date.

7. When the hearing convened, the parties filed a comprehensive agreed statement of fact. In addition, the parties called two witnesses to give evidence to supplement the agreed facts.

8. The agreed statement of fact filed by the parties stated:

Without prejudice to their right to call such further or additional evidence which does not contradict the facts set out below, the Parties agree to the following facts for the purpose of the hearing before the OLRB:

THE PARTIES

1. The Responding Party, ARAMARK Canada Limited ("ARAMARK") is a corporation carrying on business as a food, beverage, cleaning and support services provider to a wide range of healthcare, business and education customers across Canada. ARAMARK provides its cleaning support services to customers through a wholly owned subsidiary company named ARAMARK Canada Facility Services Limited.

2. The Applicant, Ontario Provincial District Council ("OPC"), is a certified council of trade unions made up of affiliates of the Labourers' International Union of North America. The Minister of Labour has designated the Ontario Provincial District Council as the Labourers' Employee Bargaining Agency pursuant to section 153(1)(a) of the *Labour Relations Act, 1995* ("*LRA*").

THE APPLICATION FOR CERTIFICATION

3. On October 29, 2006, OPC filed an Application for Certification under section 128.1 of the *LRA*. The Application relates to the following bargaining unit:

> All construction labourers in the employ of the Respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers employed in all other sectors of the construction industry excluding the industrial, commercial and institutional sector in O.L.R.B., Area 2, save and except non-working foremen and persons above the rank of non-working foremen.

4. The Application was filed in respect of ARAMARK cleaning personnel assigned to clean various trailers located on the Shell Canada refinery site located at 150 St. Clair Parkway, Corunna, Ontario. OPC claims in the Application that three employees were working in the proposed bargaining unit on the Application Date. OPC seeks certification on the basis of the membership evidence filed.

5. ARAMARK filed a timely Response to the Application on November 2, 2006. In its Response, ARAMARK agreed with the above-noted bargaining unit, but disagreed with OPC's estimate of the number of employees in the bargaining unit. ARAMARK's position is that none of its employees performed construction labourers' work on the Application Date and, therefore, there are no employees in the proposed bargaining unit.

6. ARAMARK indicated in its Response that its employees were performing work on three separate jobs sites: Shell Canada, Basell

Canada and TransAlta. The parties have since agreed that no construction work took place on the Basell Canada and TransAlta sites on the Application Date. Accordingly, the Application relates only to those employees who were working on the Shell Canada site on the Application Date.

7. The parties agree that the following individuals worked at the Shell site on the Application Date:

   #1. Chamberlain, Rayme
   #2 Davidson, Tina; and
   #5. Stairs, Edward

8. Rayme Chamberlain worked at the Shell site from 6:00 p.m. on October 29, 2006, to 6:00 a.m. on October 30, 2006. Tina Davidson worked at the Shell site from 6:00 a.m. to 6:00 p.m. on October 29, 2006. Edward Stairs worked at the Shell site from 9:00 p.m. on October 28, 2006, to 6:00 a.m. on October 29, 2006.

9. The Parties agree that the issue to be determined is whether these three individuals performed construction labourer's work on the Application Filing Date. ARAMARK does not agree that these individuals performed construction labourer's work, and accordingly, their status remains in dispute.

10. The parties agree that all other individuals proposed by OPC or listed in ARAMARK's Schedule "A" list are not properly included in the proposed bargaining unit and are therefore agreed out.

COLLECTIVE AGREEMENTS BETWEEN ARAMARK AND THE LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1089

11. ARAMARK and the Labourers International Union of North America, Local 1089 (the "Labourers") are currently party to a non-construction industry Collective Agreement covering cleaning work performed by ARAMARK personnel at the Shell Canada site located at 150 St. Clair Parkway, Corunna, Ontario (the "Shell Collective Agreement"). The recognition clause of the Shell Collective Agreement provides as follows:

> The Employer recognizes the Union as the sole collective bargaining agent for all employees of ARAMARK Canada Facility Services Limited at Shell Canada Sarnia Manufacturing Centre (Refinery), St. Clair Parkway, Moore Township, Corunna, Ontario, and Basel Chemical Plant, La Salle Road, Moore Township, Corunna, Ontario save and except persons above the rank of forepersons, office, sales and clerical staff.

12. The Shell Collective Agreement was first executed in 1993 as a voluntary recognition agreement and has been renewed every three years since then. The term of the current Shell Collective Agreement runs from September 2, 2005 until September 1, 2008. A copy of the Shell Collective Agreement is attached hereto as **Exhibit "A"**.

13. ARAMARK and the Labourers are also party to a second non-construction industry, Collective Agreement covering cleaning work performed by ARAMARK personnel at the Dow Chemical Plant, located on Vidal Street South, Sarnia, Ontario (the "Dow Collective Agreement"). The recognition clause of the Dow Collective Agreement provides as follows:

> The Employer recognizes the Union as the sole collective bargaining agent for all employees of ARAMARK Canada Facility Services Ltd. at Dow Chemicals Canada Inc., Vidal Street South, Sarnia, Ontario save and except persons above the rank of forepersons, office, sales and clerical staff.

14. The term of the current Dow Collective Agreement runs from September 2, 2005 until September 1, 2008. A copy of the Dow Collective Agreement is attached hereto as **Exhibit "B".**

15. ARAMARK and the Labourers have a mature bargaining relationship. The Collective Agreements between the parties have existed in essentially the same form, covering the same janitorial work at the same sites for approximately 13 years.

16. In its Response, ARAMARK raised an issue with respect to the timeliness of the Application based on the currency of the Shell Collective Agreement. The parties agree that the timeliness issue raised by ARAMARK will only be relevant if the individuals who are the subject of the Application were not performing work in the construction industry on the date of Application. That is, if the employees who OPC seeks to represent were not working in the construction industry on the Application Date, the Application would be untimely and would have to be dismissed.

THE SHELL CANADA SITE

17. The Shell Canada site is a petroleum refinery facility owned and operated by Shell Canada Limited ("Shell"). The Shell site is located at 150 St. Clair Parkway, Corunna, Ontario.

18. ARAMARK provides janitorial cleaning services to the Shell Canada facility. These services consist of cleaning, restocking of toiletries, dusting, floor stripping, garbage removal, waxing and other related duties. Job descriptions for "Heavy Duty" and "Light Duty" cleaners are attached hereto as **Exhibit "C"**.

19. At all times material to the Application, Shell was conducting a planned shut-down of the Shell facility, which began in or about March, 2006. The shut-down entailed large-scale cleaning, equipment inspection, construction work, equipment maintenance and repairs. The shut-down included the installation of a new boiler unit, known as a "Fluid Catalytic Cracking Unit". The extent, timing and exact location of the construction and maintenance work that took place on the Shell Canada site remains in dispute between the parties.

During the course of the hearing, the parties agreed that for purposes of only this application for certification that at the times material to this application 35 percent of the work described in paragraph 19 of their agreed statement of fact was maintenance work and the balance of the work carried out at the Shell facility during that time was work within the construction industry as defined by section 1(1) of the Act.

20. The shut-down maintenance and construction work was carried out by Shell employees and a large number of tradesmen employed by contractors that Shell engaged to undertake the work. On the date of the Application, several hundred construction workers, representing a variety of trades, including construction labourers, were present on the Shell Canada site.

21. Each one of the contractors engaged by Shell Canada was required to have its own portable trailer or group of portable trailers on site. The purpose of these trailers was to service the maintenance and construction workers on the site. The vast majority of the trailers were localized in one area of the site known as "trailer city".

22. Neither Shell Canada nor ARAMARK had any responsibility for cleaning and maintaining the contractors' trailers. ARAMARK cleaned and maintained only the trailers owned provided by Shell. The contractors were responsible for cleaning and maintaining their own trailers, and they used their own construction labourers for that purpose.

TRAILERS CLEANED BY ARAMARK ON THE APPLICATION DATE

23. ARAMARK employees cleaned a total of 13 trailers on the Application Date, all of which were owned and operated by Shell. The trailers fall into the five groups set out below.

(a) Shell Blast-Proof Trailers

There were a total of five temporary blast-proof trailers located on the site on the Application date. These trailers were provided by Shell for use by Shell health and safety employees.

(b) Shell Inspection Trailers

Two temporary inspection trailers were located on the site. Both were provided by Shell for use by Shell inspection employees.

(c) Shell Maintenance Trailers

Two temporary maintenance trailers were located on the site. Both were provided by Shell for use by Shell maintenance and health and safety employees.

(d) Shell Wash Trailers

One permanent wash trailer was, and continues to be, located on site. Two temporary Shell wash trailers were also on site on the Application Date. The two temporary wash trailers were removed after the shut-down was complete. All three wash trailers were located in trailer city. All three wash trailers were provided by Shell. The three wash stations provided by Shell were intended to be used by Shell employees and workers involved in the shut-down. However, at all times material to the Application, the wash trailers were accessible to any workers authorized to be on site.

In addition to the three Shell wash trailers, at least two other temporary wash trailers were located on site. ARAMARK had no responsibility for cleaning these wash trailers.

(e) Shell Shut-Down Planning Trailers

One permanent planning trailer was, and continues to be, located on site. This trailer is owned and operated by Shell for use by Shell planners/coordinators.

24. A diagram of the Shell site indicating the location of "trailer city" and each of the Shell Trailers is attached hereto as **Exhibit "D"**.

25. With the exception of the three Shell wash trailers, all of the trailers serviced/cleaned by ARAMARK on the Application Date were provided by Shell for the exclusive use of Shell employees and not those employed by the contractors on site. Although employees of contractors occasionally entered Shell trailers in the normal course of business, the contractors used their own trailers for conducting their business and servicing their employees.

26. The trailer cleaning work undertaken by ARAMARK cleaners consisted primarily of garbage clean-up, mopping, and general cleaning duties. ARAMARK cleaners utilized cleaning spray, dust mops, garbage bags, and other janitorial cleaning materials in the course of their duties. The Parties disagree on the extent to which ARAMARK cleaners performed duties outside of the trailers.

27. A special schedule was created for the shut-down with separate sign-in sheets. The ARAMARK cleaners who worked on the shut-down were typically scheduled for eight hour shifts, Monday to Friday, and 12 hour shifts on Saturdays and Sundays. On the date of the Application, ARAMARK cleaners worked 12 hour shifts, scheduled from 6:00 a.m. to 6:00 p.m., and 6:00 p.m. to 6:00 a.m. the next day.

9. The parties supplemented their agreed statement of fact with the testimony of two witnesses: Tina Davidson, one of the cleaners who was at work on the application date and was also a union steward, and Tim Phelan, the responding party's manager of its southwest Ontario district which encompassed Sarnia and the Shell Canada facility.

10. Ms. Davidson explained that during shutdown periods the Aramark cleaners were assigned to clean and maintain the washroom trailers for which Shell was responsible, as well as the other trailers Shell had in place for its employees. As noted in the parties' agreed statement of facts, all of the contractors performing work on the site during the shut down were responsible to bring their own trailers to the facility and used construction labourers to clean those trailers.

11. The work Ms. Davidson carried out on the application date was the same kind of work she normally performed at the Shell Canada refinery. She and the other Aramark cleaner also emptied the garbage pails outside the Shell trailers as part of their work during the shutdown. Ms. Davidson did not empty those outside garbage pails during her normal shift. Each garbage pail was lined with a garbage bag. The garbage pails were emptied by pulling out the garbage bag and were generally emptied once a shift. Ms. Davidson said there was "normal" kinds of garbage in those pails; things like used food containers and coffee cups, disposable coveralls and gloves.

12. The Aramark employees were required to wear their hard hats when they were walking through the refinery area. Ms. Davidson acknowledged she was required to wear her hard hat in the yard during her regular shifts but suggested she wore her hard hat more often during the shutdown times.

13. The garbage collected from the washrooms, trailers and outside garbage pails was taken to large garbage bins for collection and disposal. The construction labourers employed by the construction contractors on site also took the garbage they collected to those same large garbage bins.

14. Mr. Phelan testified that Aramark was responsible for maintaining and cleaning the Shell Canada operational trailers that are occupied during the shut down periods. The parties agreed that Aramark provides janitorial and cleaning services at the Shell Canada facility that are unrelated to any construction work that may take place there from time to time. Aramark's contract with Shell Canada requires Aramark to provide janitorial and cleaning services at Shell Canada's offices, meeting rooms, and washrooms used by Shell Canada employees involved in the operation of the facility. The Shell Canada operational trailers were at the Shell Canada refinery both before and after the shutdown and those same trailers are used from time to time during Shell's regular operations and are cleaned by Aramark's employees. Mr. Phelan agreed during his cross-examination that the two temporary washroom trailers were brought to the Shell Canada refinery site by Shell Canada because so many more people would be at their refinery, engaged in both construction and maintenance work during the shutdown. Those two washroom trailers were removed from the site when the shutdown work was finished. Shell Canada does not want construction contractors' employees entering its buildings, so that is why Shell Canada has office trailers on the site and why it brought two additional washroom trailers to the facility for use during the shutdown.

15. The work carried out by Aramark employees during what Mr. Phelan said Shell Canada characterized as "maintenance shutdowns" is in addition to the normal janitorial and cleaning service work Aramark provides under its contract with Shell Canada. Mr. Phelan testified that Aramark has a fixed price contract with Shell Canada for the normal cleaning and janitorial services it provides and negotiates an "extra billing price" for the work done during the shutdown.

16. Mr. Phelan also testified the Aramark cleaners were expected, in addition to cleaning and maintaining the Shell operational trailers, including the wash trailers during the shutdown, to empty the outside garbage pails used for what he described as domestic garbage: food containers, coffee

cups, candy wrappers and pop cans. The pails for the domestic garbage were lined with a garbage bag that was removed when the garbage pails were emptied. Outside the trailers were other larger 50 gallon plastic barrels without garbage bag liners. Those larger plastic barrels were used to collect scrap wood, metal and other debris. Construction labourers employed by Jacobs Catalytic were responsible for emptying those plastic barrels.

17. It was clear to me from the evidence and the agreed facts that the Aramark employees who are the subject of this application were responsible for cleaning and maintaining the Shell Canada trailers that were used principally by Shell Canada employees during the shutdown and for also continuing with their regular cleaning duties in the washrooms and offices of the buildings at the Shell Canada refinery. As the Board noted at paragraph 12 of its September 20, 2007 decision, the applicant's claim that the Aramark employees were working in the construction industry on the application date rests on the theory that where an employer is responsible for "cleaning trailers—whether office, food/cafeteria, or washroom—and those trailers are connected or related to ongoing construction activity, such cleaning work is work that is in the construction industry."

18. The applicant contended that because two temporary washroom trailers were added and all three washroom trailers were used by the construction employees of on site construction contractors as well as by Shell employees, the cleaning work in those washroom trailers, in particular, was properly characterized as work within the construction industry. The applicant acknowledged the one permanent washroom trailer also had to be cleaned when there was no shut down or construction work taking place, but asserted that with the shut down and large numbers of construction employees on site using those facilities, the cleaning work had to be carried out much more frequently.

19. The applicant relied principally on the analysis adopted by the Board in *Ellis Don Limited*, [1993] OLRB Rep. July 589 and later in *Magic Maid Cleaning Service*, Board File No. 3643-05-R, decision dated July 14, 2006, unreported, Q. L. cite [2006] OLRD No. 2723 for the proposition that employees engaged in cleaning and clean up work in connection with a construction project are working in the construction industry. It contends that it is not the nature of the work done by employees that is significant but rather it is that the work is carried out at facilities used by persons who are clearly engaged in construction work. Moreover, the applicant submits the washroom trailers and other trailers being cleaned by Aramark's employees on the application date were at the project by reason of the construction work carried out at the Shell Canada facility from time to time. It points out the only reason for those temporary wash trailers being at the site was because construction work was being carried out and several hundred tradespeople, employed by contractors engaged by Shell Canada and by Shell Canada itself, were employed to perform that work. Thus, the applicant argues the clean up and cleaning work done in the temporary trailers was work connected to a construction project and therefore was work within the construction industry. As a result, the employees in dispute were employees in the construction industry on the application date, according to the applicant.

20. The applicant made it clear during argument it accepts that the cleaning work done by Aramark employees in the buildings at the Shell site is not construction industry work. It asserts that the work done in the temporary buildings or trailers that are situated at the Shell Canada facility by reason of the construction work being carried out there is in the construction industry.

21. The Board in *Magic Maid Cleaning Service* held the employees engaged in cleaning the lunchroom, washroom and office trailers at the Sunoco refinery in Sarnia were employed in the construction industry. It noted the work at the Sunoco site involved cleaning 15 of the 30 trailers at

that project. The other 15 trailers were operated by various subcontractors. It therefore appears the trailers being cleaned by the employees who were the subject of the application were not the trailers used by subcontractors.

22. In *Magic Maid Cleaning Service* the Board wrote at paragraph 19:

> The work here at issue is part of the ongoing work that is occurring on the construction site. As in *Ellis Don*, the purpose of the Genesis project is as a construction site. The people that these employees are assisting are those engaged in the construction activity. The ongoing work of the employees is to ensure that the other workers on the site have the services this work provides. It is not simply the kind of debris that is important but the nexus or connection between the clean up and the construction. The clean up work involves not only the cleaning away of materials from the site, but also the cleaning necessary to enable the various trades on site to perform their work.

23. The *Ellis-Don* decision the Board referred to is *Ellis-Don Limited*, [1993] OLRB Rep. July 589 in which the Board held that the final clean up work done by employees of Final Touch, a cleaning subcontractor, was work within the construction industry.

24. The Board's conclusion in *Magic Maid* was based on the findings set out in paragraphs 19 and 20 where it wrote:

> 19. ... The ongoing work of the employees is to ensure that the other workers on the site have the services this work provides. It is not simply the kind of debris that is important but the nexus or connection between the clean up and the construction. The clean up work involves not only the cleaning away of materials from the site, but also the cleaning necessary to enable the various trades on site to perform their work.
>
> 20. ... I prefer the approach adopted in *Ellis Don* which facts closely resemble those of the instant case. In that case, the clean up was also dusting, cleaning and vacuuming and not work that may more typically be viewed as construction. That is the same work that is performed here by the Magic Maid employees.

25. In *Magic Maid* the Board found that the work done by the employees in issue "was necessary to enable the various trades on site to perform their work" and that the work they were doing, although "not work that may more typically be viewed as construction" was the same kind of work that was found to be work in the construction industry in *Ellis-Don*.

26. Whether the employees who are the subject of this application are employed in the construction industry depends on whether Aramark is an employer in the construction industry. The term "construction industry" is defined by section 1(1) of the Act which provides:

> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

27. An employer in the construction industry is defined by section 126(1) of the Act, the relevant portion of which states:

> "employer" means a person ... who operates a business in the construction industry

28. Therefore, an employer in the construction industry is a person who operates a business engaged in "constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site".

29. If an employer's employees are engaged in "constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site" then it follows their employer is operating a business in the construction industry. See *Municipality of Metropolitan Toronto*, [1989] OLRB Rep. Mar. 279 at 288; *A-1 Hydrant Services Ltd.*, [2005] OLRB Rep. May/June 350 at 355; *Honeywell Limited*, [1993] OLRB Rep. Feb. 128 at 152; *Cedarhurst Paving Co. Limited*, [1964] OLRB Rep. Dec. 442. In *Municipality of Metropolitan Toronto* the Board wrote at page 288:

> The phrase "person who operates a business in the construction industry" has not been confined in application to vendors of construction services. In the final analysis, any person who employs workers to perform construction work has been treated as an employer in the construction industry for the purpose of applications for certification under the construction industry provisions of the Labour Relations Act.

30. A similar analysis was used by the Board in *A-1 Hydrant Services* when it wrote at page 355:

> It seems to me that the appropriate approach is to focus on both the work being done and the context in which that work is done. To find that the work in issue is not construction work because the person who did the work is not in the construction industry would, I think, analyze the issue from the wrong perspective. An employer carries on business in the construction industry when it is engaged in constructing water mains. If the work of constructing a water main includes its cleaning, disinfecting and final testing, then the business performing that work is a business engaged in the construction of a water main even though that business does not actually dig the trench or lay the pipe that are also elements of the construction of a water main.

31. The Board more than forty years earlier in *Cedarhurst Paving Co. Limited* used that same kind of analysis to determine whether certain truck drivers were employees in the construction industry when it wrote:

> If the operations or services performed by these drivers are regarded as an integral and necessary part of the business of the respondent in constructing, altering or repairing roads at the site, then in our view the wording of the definition of construction industry in section 1(1) (da) [now 1(1)(f)] is wide enough to include such employees under the construction industry provisions of the Act.

32. There is no doubt the work done by the employees in issue, which did not involve cleaning up construction debris, but was the cleaning of office and washroom trailers, is not work, as the Board observed in *Magic Maid* that would normally be considered "construction work". Moreover, as the parties agreed, Aramark provides "cleaning support services". There was no suggestion Aramark was engaged in "constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site". Therefore the issue is whether, when Aramark is responsible for cleaning washroom and office trailers located at its client's facility where construction work is taking place, Aramark is an employer in the construction industry and its employees are engaged in construction work.

33. In making that determination it is vital, in my view, to consider the context and circumstances giving rise to how that work came to be done by Aramark. Aramark has a janitorial and cleaning contract with Shell Canada. Shell Canada required Aramark to undertake additional cleaning and janitorial work because its office and washroom trailers would be used much more frequently during the shutdown. While there is no doubt that the construction contractors' employees used the Shell Canada washroom trailers although the parties agreed those trailers "were intended to be used by Shell employees and workers involved in the shut-down", I am not persuaded merely because those washroom and other trailers were accessible to workers engaged in construction work and were located at or close to where construction work was taking place, Aramark was operating a business in the construction industry when its employees were cleaning those trailers during the shut down.

34. In *Magic Maid* the Board held that cleaning work on a construction site that is "necessary to enable the various trades on site to perform their work" is work in the construction industry. It adopted the approach the Board took in the earlier July 2003 *Ellis-Don* decision in which the Board held that simply because Ellis-Don had subcontracted the final clean up of the building it was constructing to a janitorial company, the nature and character of the work as being work in the construction industry did not change.

35. The facts of the case before me are different. It is, in my view, critical to the analysis of the issue to have regard to paragraphs 21 and 22 of the agreed statement of fact. I repeat those two paragraphs for ease of reference:

> Each one of the contractors engaged by Shell Canada was required to have its own portable trailer or group of portable trailers on site. The purpose of these trailers was to service the maintenance and construction workers on the site. The vast majority of the trailers were localized in one area of the site known as "trailer city".
>
> Neither Shell Canada nor ARAMARK had any responsibility for cleaning and maintaining the contractors' trailers. ARAMARK cleaned and maintained only the trailers owned provided by Shell. The contractors were responsible for cleaning and maintaining their own trailers, and they used their own construction labourers for that purpose.

36. The construction contractors at the site were responsible for cleaning the trailers used by their own construction employees and the construction labourers employed by Jacobs Catalytic were responsible for emptying the large barrels containing construction debris outside the trailers. Thus, unlike the facts in *Magic Maid*, one cannot say that the cleaning work carried out by Aramark on the

Shell Canada washroom trailers was "necessary to enable the various trades on site to perform their work". The construction contractors provided washroom trailers and other facilities for use by their employees and the cleaning of those trailers, whether done by their own employees or subcontracted to a janitorial service like Magic Maid would, as the Board held in *Magic Maid*, be work in the construction industry undertaken by construction labourers.

37. I recognize that the work being done by the employees in issue was carried out at or adjacent to a construction site. But, as I had observed in paragraph 18 of the Board's September 20, 2007 decision in this matter, "merely because work takes place at a construction site does not necessarily mean that such work is work within the construction industry."

38. In the result, the applicant has not satisfied me that Aramark was an employer in the construction industry when its employees were assigned to undertake the cleaning of the Shell Canada office and washroom trailers and other related outside cleaning work at the Shell Canada facility during the shut down. The employees who are the subject of this proceeding were therefore not employed in the construction industry and accordingly were employed in the bargaining unit set out in the collective agreement between the applicant and Aramark that does not apply to the construction industry.

39. The applicant acknowledged at the outset of this proceeding that if the employees in issue were not working within the construction industry on the application date, this application would be untimely and would have to be dismissed.

40. Given my finding that the employees who are the subject of this application were not at work in the construction industry on the application date, this application is untimely and is therefore dismissed.

1411-08-U Arlene Danos and Tracey MacLeod, Applicant v. Canadian Union of Public Employees, Local 1750, Responding Party

Conflict of Interest – Duty of Fair Representation – Remedies – The employer sought the union's agreement to eliminate a class of positions and reclassify it to a new position in a higher salary grade – The employer suggested the persons occupying the former position be moved to the new position – Two employees wrote to the union claiming that the new positions were vacancies and ought to have been posted – The employees were qualified for the former position and more senior than some of the employees moved to the new position – The union relied on the collective agreement and past practices of reclassification to support its decision not to file the applicants' grievance – The Board found the examples of past practice not to be similar and questioned the interpretation of the collective agreement – More significantly, the Board agreed with the applicants that the union's process was flawed and breached s.74 of the Act in that the union's executive was in a conflict of interest – Two of the union's officers were part of the group of persons that benefited from the reclassification to the new position and were less senior than the two applicants – These officers were members of the union's committee who determine whether grievances are to be filed and taken to arbitration –The committee reached a decision by consensus and did not vote – The Board noted this to be of

critical importance and found that the two officers in a conflict of interest were part of the consensus even if they did not orally participate in the meeting – The Board found the union's decision was arbitrary in that it was based on irrelevant factors, namely the interests of these two officers and that the union dealt with the applicants' concerns in a perfunctory way – The Board ordered the union to file a grievance on behalf of the applicants and pay independent counsel selected by the applicants to represent them at the arbitration hearing – Application allowed

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Michael Smyth* for Arlene Danos; *Tracey MacLeod* appearing on her own behalf; *Risa Pancer, Jim Morrison, Beth Harris* and *Patricia Homonnay* for the responding party; *Paul Simourd* for the Workplace Safety and Insurance Board.

DECISION OF THE BOARD; October 15, 2009

1. This is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") which alleges a breach of s. 74 of the Act. This application took two days to complete: the first day was a consultation; the second day was a brief hearing to hear oral evidence on one point. This decision determines the application.

2. The applicants are employees of the Workplace Safety and Insurance Board (the "WSIB"). They are represented in their employment relations with the WSIB by the responding party trade union.

3. The WSIB determines, among other things, whether injured workers are to receive benefits pursuant to the Province's workers compensation scheme. In order to determine whether employees are to receive benefits, the WSIB has established an extensive adjudicative process. The applicants are part of that process and occupy the position of Adjudicator. There are other adjudication positions in the WSIB including Regulatory Claims Officer and Appeals Resolution Officer, the two positions at the heart of this application.

4. On or about May 21, 2008 the WSIB advised the union that the job classification of Regulatory Claims Officer (Salary Grade 880) was to be reclassified to the position of Appeals Resolution Officer (Salary Grade 885) and that the Regulatory Claims Officer's job would no longer exist. The WSIB decided that having the two positions separate created inappropriate decision-making friction between the two categories of decision-makers since employees in each position could make rulings about similar subjects. It decided it no longer needed any Regulatory Claims Officer. The WSIB suggested that persons occupying the Regulatory Claims Officer position be moved to the Appeals Resolution Officer position. The WSIB sought the union's agreement to this suggestion.

5. The union immediately recognized that dealing with the employer's request placed the union's executive in a potential conflict of interest (about more will be said later) because two of its officials were Regulatory Claims Officers and would benefit by the employer's decision. Accordingly, the President of the Local Mr. Goslin asked Ms. Beth Harris, the Vice-President of the Local, to deal with the matter. She was chosen because she was not qualified for any of the jobs in

question and she had run a slate of candidates against Mr. Goslin in the previous union executive elections. She was therefore not considered allied with him.

6. Ms. Harris agreed to the employer's request.

7. Following that, the employer sent a letter to employees which stated:

> In the last few months, I have been working with your managers to look for ways for the Appeals Branch to be more effective and efficient and ensure better integration and alignment of our resources.
>
> The Regulatory Claims Officer (RCO) job has evolved over the years to a point that an RCO currently performs similar functions to the Appeals Resolution Officer (ARO) position with respect to non-compliance or misrepresentation cases. In view of these similarities, I have reclassified the RCO job to an ARO job effective June 2, 2008. In addition, some functions for the management of these cases will no longer be performed in the Appeals Branch, but will return to Operations (e.g., witness protection files). Therefore, effective June 2, 2008, the RCO job will no longer exist. The staff who are currently in the RCO position will become AROs, carrying out the full job duties of an ARO.
>
> The Appeals Branch will continue to deal with non-compliance or misrepresentation cases where appropriate (e.g., ensure that adjudicative tasks are aligned with investigation and prosecution requirements in cases involving potential non-compliance). The job tasks that relate to this function will continue to be performed by Dan, Frank, Josie and Tino. This work will be managed in the same way that we deal with appeals for traumatic mental stress, worker/independent operator and re-employment. We will have one 'lead manager' for this work, Ron Horne, and the AROs who perform this work will report on it to Ron.
>
> In a further effort to deploy staff to address gaps in team resources, Dan will move to Team 1 and Frank will move to Team 2. Josie and Tino will remain on Team 6. This change is also effective June 2, 2008.
>
> Dan, Frank, Josie and Tino will work with their respective managers over the next few weeks to ensure a smooth transition into their new role as an ARO, while continuing to perform any necessary work relating to non-compliance or misrepresentation cases. I hope you will join me in wishing them well in their new their new [sic] role as an ARO.

8. There were six Regulatory Claims Officer positions, two of which were held by the union officers. (However, I note that the union officers were in full time union positions and therefore they occupied the Regulatory Claims Officer positions as "home" position). Each of the union officers had less seniority than the two applicants. The applicants' position of Adjudicator is lower rated and paid less than the Appeals Resolution Officer position.

9. In June 2008 the applicants wrote to Local 1750 claiming that the new Appeals Resolution Officer positions created as a result of the discontinuance of the Regulatory Claims Officer position were vacancies and ought to have been posted. It is agreed that the applicants were qualified for the

Regulatory Claims Officer position and were more senior than at least some of the employees who were moved to the position.

10. The union has a committee of "Table Officers" which, in part, determine whether grievances are to be filed and taken to arbitration. The committee was chaired, at least in this instance, by CUPE National Representative, Ian Thompson, who testified before me. Two of the Table Officer committee members are Mr. Goslin and Ms. Corradi the union officials who had been reclassified to the Appeals Resolution Officer position.

11. At the commencement of the committee's discussion of the applicants' circumstances Mr. Thompson advised there was no basis for filing a grievance due to there not being any vacant positions and "according to his investigation into previous reclassifications" where, CUPE Local 1750 had taken the position that the incumbents in the positions should be allowed to follow their work. He also at that time expressed a concern that Mr. Goslin and Ms. Corradi were in a conflict of interest and requested that they excuse themselves from the meeting. They objected to the request and argued with Mr. Thompson. In the end, Mr. Goslin and Ms. Corradi, did not leave the meeting, but apparently did not speak thereafter. Eventually, the committee decided not to file a grievance on the applicants' behalves. There was no vote on the decision as it was "decided" by consensus. In my view a fair summary of the situation is that Ms. Corradi and Mr. Goslin were part of that consensus even though they may not have spoken up.

12. No one spoke to the applicants about their grievances prior to the meeting. The committee's decision was relayed to the applicants by e-mail as follows:

> Arlene and Tracey,
>
> This is a reply to your e-mail requesting that grievances be filed.
>
> We discussed this issue at today's Officer meeting and I want to confirm the results of the discussion.
>
> When a position is reclassified, the incumbents in the position have the right to follow their work. In this particular case, Beth Harris, VP Regions was assigned to investigate and discuss the reclassification with the employer. She determined that the reclassification was legitimate and that it was appropriate for the affected members to follow their work.
>
> This is consistent with the way reclassification has been dealt with in the past therefore, there is no basis for filling grievances on this matter.
>
> Patricia
> Arlene Danos/CED/WCBO

13. Mr. Thompson testified that he relied on two pieces of information in deciding that a grievance was not warranted:

i) the collective agreement; and

ii) past practice.

14. As for the collective agreement, Article 6 deals with "Organizational/Technological Change". Article 5 deals with filling vacancies.

15. Article 5.03 states:

> **5.03 Order of Consideration for Vacancies**
>
> See Appendix 1 for the chart illustrating the process for filling a vacancy.
>
> **First Consideration**
>
> First consideration for filling any vacancy will be given to employees:
>
> - Who, based on medical documentation are afforded Special Placement rights because they are unable to perform their normal duties on a permanent basis, or,
> - Whose position is made redundant by organizational or other changes and have Priority Placement rights (see Article 6), including those who have displaced a contract employee or,
> - Who have Priority Placement rights and are laid off and are exercising their right to recall (see Article 6.10).
>
> In order of seniority, employees will be offered placement into vacancies for which they have the comparable knowledge, skills and abilities (KSA), at or below their current salary grade or salary grade previously affected in, whichever is greater. The Employer may perform a KSA gap analysis to identify training needs.
>
> Priority Placement employees will be afforded retraining and a work trial as noted in Article 6.
>
> Special Placement employees will be afforded retraining in accordance with Article 6.05(d).
>
> The parties agree that they all have an obligation to assist Special Placement employees find suitable employment which maximizes the use of their skills and where possible maintains their earnings potential. In order to do this the Employer will seek suitable employment opportunities in consultation with the Union and the employee.
>
> [emphasis added]

16. "Priority Placement Rights" are discussed in Article 6 of the collective agreement which deals with Organizational and Technological change.

17. These are complicated collective agreement provisions. However, the emphasized portions of the collective agreement appear to restrict employees with Priority Placement Rights to positions which are at or below the employee's current salary guide. The union does not agree with

that interpretation. It asserts that the Regulatory Claims officers were "reclassified" to the position of Appeals Resolution Officer. If it is a reclassification, it asserts, different provisions apply.

18. As for the past practice, in its initial response the union relied on several instances where employees had been reclassified after their job duties had changed. At the hearing, the union sought to rely on other instances of what it considered to be past practice.

19. The circumstances relied on were instances of reclassification. For example, in 2001 there were two large (3-400 employees) reclassifications where classifications were essentially amalgamated to the highest rated position. There was also another large reclassification in 2008. However, the union took that to the membership for ratification.

Decision

20. Section 74 of the Act states:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

21. In *Catherine Syme*, [1983] OLRB Rep. May 775, the Board confirmed that a union is not obligated to file a grievance merely on the denial of an employee and is entitled to take into consideration many factors in assessing whether it should process a grievance, as long as the union acts in compliance with the Act in doing so:

> 20. Section 68 [now 74] requires a trade union to act fairly, *inter alia,* in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining union who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official – especially an elected one – cannot be expected to exhibit the skills, ability, training and judgment of a lawyer.

22. Here the applicants' main claim is that the union's decision was arbitrary and in bad faith. The Board, in *Abdel Elejel*, [1985] OLRB Rep. June 841, considered the meaning of the term "arbitrary" at page 852 when it wrote:

> In order to find arbitrariness, this Board would have to conclude that the Union failed to direct its mind to the merits of the complainant's grievances or failed to enquire into or act upon available evidence or conduct any meaningful investigation to obtain the information to justify its decision. *Alternatively, arbitrariness could be established if the complainant could show that the Union acted on the basis of*

> *irrelevant factors or principles or displayed an attitude that was indifferent, capricious or non-caring towards the complainant.*
>
> (emphasis added)

Thus, not only is a decision arbitrary if the union through its decision making process fails to take into account relevant factors, a decision is arbitrary if it is based on irrelevant factors or principles.

23. The applicants' arguments focused on the union's process, including the decision not to pursue a grievance on behalf of the applicant. I agree with the applicants that the process was flawed and breached s.74 of the Act.

24. Of critical importance is the fact that the Table Officers made their decision by consensus and not by vote. I am satisfied Mr. Goslin and Ms. Corradi were part of that consensus even though they did not orally participate.

25. The union's decision to permit Mr. Goslin and Ms. Corradi to participate in the Table Officer's meeting despite their obvious conflict of interest was arbitrary because the union's decision was tainted by the motives of the individuals who were part of the committee making the decision. Even though they did not speak, the mere fact that they argued about whether they could participate and remained present made clear their interests. The union's decision is therefore arbitrary because it took into account irrelevant factors – the interests of Goslin and Corradi.

26. The union's case is not enhanced by the rather perfunctory way they dealt with the applicants' concerns. The union did not meet with the applicants' or seek their impact before making a decision. The applicants were not given much of an opportunity to "make their case" to the union.

27. Moreover, the examples of employees moving with their jobs on reclassification relied on by the union are problematic. Each of these related to large numbers of employees where there was an obvious interest in reducing disruption. In fact the union had the employees ratify one of the changes. Here, there were only six employees affected. The past practice cited by the union would appear to bear little similarity to these circumstances.

28. This is not to say that every decision made by a union official who is in a conflict of interest position results in a violation of the Act. The Board recognizes that a decision may be made on behalf of the bargaining unit as a whole which benefit the union officials who made the decision. A good example is the recognition of super seniority rights for union officials in bargaining. In that case, super seniority rights also benefits the bargaining unit as a whole because it ensures there are experienced elected union officials at work. However, in this situation, the benefit to Mr. Goslin and Ms. Corradi was direct and personal.

29. It also may be that the situation could have been saved had circumstances been different. Perhaps had the collective agreement provisions been clear, or had the union obtained legal advice, the issue might have been decided differently.

30. That leaves the question of remedy. In my view the decision of the Board in *Abdel Elejel, supra,* is of assistance:

> 61. Given the democratic structure of this Union and the Board's desire to encourage such a structure, it would normally be preferable to refer a case back to the Union to reconsider. However, in this case, the Board must conclude that a remittance of the complainant's situation back to the local membership would not be an effective remedy. The damage, or the potential damage done by Mr. Paul in his presentation to the Union membership cannot be undone by sending the matter back to the membership and hoping that they will treat the matter anew. It would be the equivalent of an appeal court sending a case back for a new trial before the same jury after declaring a mistrial. The unfairness created in the first proceeding could not be eased in the minds of the jury. Thus, the Board concludes that the only effective and fair remedy in the circumstances is to direct the Union and the Company to arbitrate Mr. Elegel's grievance forthwith, notwithstanding the time provisions in their collective agreement.
>
> 62. The Board also concludes that this is an appropriate case to order the Union to engage an independent counsel that is jointly chosen by the complainant and the Union to represent the Union in the arbitration of the grievance. This decision is made not because of any concern over the Union representative's ability to present a case effectively. Instead, the order is made because unless an independent counsel is engaged, the Union would be unable to effectively present an argument on behalf of Mr. Elejel given the position it has had to take during these proceedings. Precedent for the Board making orders such as these can be found in *Leonard Murphy*, [1977] OLRB Rep. March 146, *Consumers Glass Co. Ltd.*, [1979] OLRB Rep. Sept. 861, *The Corporation of the County of Hastings*, [1979] OLRB Rep. Nov. 1072 and *Bedard Girard Ontario, supra.*

31. I agree that in this case it would also be preferable to send the issue back to the union to make a decision untainted by conflict of interest. However, the views of the Table Officers are well established. Moreover, the union and the employer agree on the collective agreement interpretation. It is difficult to have confidence that a neutral decision could be made.

32. The Board therefore orders, notwithstanding the time limits and other provisions of the collective agreement binding upon the parties herein:

i) that the union file a grievance on behalf of the applicants as drafted by the applicants;

ii) that the parties arbitrate forthwith the applicants' grievances; and

iii) that the union pay counsel selected by the applicants to represent the applicants at the arbitration hearing.

33. I am seized if there are difficulties implementing this award.

0888-09-R Service Employees International Union Local 1 Canada, Applicant v. **Bayshore Healthcare Ltd. (c.o.b. as Bayshore Home Health), Sarnia**, Responding Party v. The Ontario Nurses' Association ("ONA"), Intervenor

Bar – Certification – *Public Sector Labour Relations Transition Act* – SEIU applied for certification for a bargaining unit that included employees in the bargaining unit for which the intervening union, ONA, had already applied for an order under s. 22 of the *PSLRTA* – The Board found SEIU's application was a breach of s. 28 (a prohibition against applications for certification from 10 days after a s. 22 request until its disposition) of the *PSLRTA* – The Board also exercised its discretion under the LRA to bar SEIU from reapplying until the Board determines the *PSLRTA* application – Application dismissed

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Caroline Cohen, Tim Cadeau* and *Ken Evett* for the applicant; *Erin Kuzz, Sundeep Gokhale, Liz Davy* and *Stuart Cottrelle* for the responding party; *Elizabeth McIntyre, Nicole Butt, Raymonde Boileau* and *Ryan White* for the intervenor.

DECISION OF THE BOARD: October 15, 2009

1. This is an application for certification. The Board held a hearing on September 8, 2009 regarding one of several issues that are present in this application: whether this application is precluded by section 28 of the *Public Sector Labour Relations Transition Act, 1997* (the "PSLRTA"). This decision determines that issue.

2. The responding party ("Bayshore") is a provider of health care services. It has for some time provided home care services under contract with local Community Care Access Centres (CCAC) including the Erie St. Clair CCAC.

3. Bayshore is one of at least three home care providers in the relevant area. The Victorian Order of Nurses ("VON") also provides services. ONA has collective agreements with VON Chatham Kent and VON Lambton Sarnia covering all registered and graduate nurses employed in a nursing capacity in those areas. Bayshore's employees are not unionized.

4. In or about November 2008, the Erie St. Clair CCAC was provided with funding to open and operate a new health clinic. As a result, the CCAC issued a Request for Qualifications to find a health care provider to open the new clinic.

5. Bayshore was awarded the contract to operate the clinic. The Bayshore Clinic began operating on December 1, 2008. The clinic is staffed by RNs and registered practical nurses (RPNs) employed by Bayshore.

6. ONA alleges that the clinic provides a number of services, including the provision of ongoing care for patients, which were previously delivered by providers of home care, including the nurses it represents at VON. It alleges that this has resulted in a reduction in the number of hours worked by its members at VON. As a result, it filed an application under the *PSLRTA* (Board File No. 0144-09-PS) alleging that the establishment of the Bayshore Clinic was a "Health Services Integration" within the meaning of the PSLRTA. In its application it seeks the opportunity to obtain bargaining rights at the Bayshore clinic through a representation vote.

7. It is useful to set out the chronology of events which followed, beginning with the union's PSLRTA application:

(1) On April 15, 2009 the Ontario Nurses Association (ONA) filed its PSLRTA application (Board File No. 0144-09-PS). The Board has not made any decision with respect to that application.

(2) On June 23, 2009 the SEIU, Local 1 Canada filed this application for certification. The unit of employees it sought is:

all Registered Nurses at Bayshore Home Health that work out of the Sarnia office, in the City of Sarnia in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff and on-call co-ordinators.

In its application the SEIU noted there were two work locations which were subject to the application: the clinic and Bayshore's offices.

(3) Bayshore filed a response to the application for certification. In its response, the employer noted that the application for certification appeared to pertain to employees affected by ONA's PSLRTA application.

(4) By decision dated June 30, 2009, the Board ordered a representation vote in the application for certification. The Board ordered the ballot box sealed.

(5) The representation vote ordered by the Board was held on July 6, 2009. At the hearing of this matter the Board ordered the ballots counted and of the ballots counted, ten were in favour of representation by the union and ten were against.

8. In order to fully understand the dispute in this matter, it is necessary to understand generally how the Bayshore Clinic is staffed.

9. Essentially the clinic is staffed by some or all of the same Bayshore employees that also provide home care services. So one day a RN might work at the clinic and the next day go to see clients at their homes. In fact, an RN might do work at the clinic and provide home care services on the same day. There is therefore no exclusive clinic workforce and there is frequent interchange between the two aspects of the Bayshore business.

10. This has two implications. First, (and while I am not deciding this issue) it appears unlikely that a bargaining unit composed of just the clinic or just the home care workers would ever be found to be appropriate. Second, there is the possibility that the Board may decide in the PSLRTA application that the appropriate bargaining unit for determining ONA's bargaining rights includes both the clinic and Bayshore's home care workers.

Decision

11. Section 28(1) and (2) of the PSLRTA state:

> **28.** (1) Subsections (2) and (3) apply if an order under section 22 is requested.
>
> (2) During the period beginning 10 days after the order is requested and ending when the order is made, no person may apply for certification of a bargaining agent to represent employees of the successor employer who are not members of a bargaining unit when the order is requested.

12. There is no dispute that ONA's PSLRTA application requests an order under section 22 of the PSLRTA.

13. The SEIU's first argument is that its application did not pertain to employees in the clinic, but only to Bayshore's home care workers and therefore s. 28 does not apply. I reject this argument. In the space in the application for certification form "Number and addresses of locations where affected employees work" the union stated there were two locations, one of which being the clinic. It is clear that the application pertained to the employees who work at the clinic.

14. The union's alternative argument is that it should be permitted to amend the bargaining unit description so that its application pertains only to the homecare workers and not the clinic. The employer objects to the amendment.

15. The Board has in other cases permitted a union to amend the bargaining unit it applies for. However, in all of the cases cited to the Board by the applicant, the request for amendment was made prior to the representation vote taking place. There are good reasons for that and some of them are highlighted by this application. For example, there is the fact that the employer's response to the application (and in this case, ONA's intervention) is based on the application made. Its proposed bargaining unit, its s. 8.1 notice, and its challenges to voters are based on the unit applied for.

16. Since the applicant clearly violated s. 28(2) of the PSLRTA, it is appropriate to do as required by the Act. The purpose of s. 28 is to provide for a settled period while the Board is adjudicating an application under the PSLRTA. Because of the interchange of employees, permitting the SEIU to proceed with an amended application for the home care worker would inevitably run afoul of that purpose. For these reasons I decline to permit the amendment. This application is dismissed.

17. For the same reason, in my view, pursuant to s. 111(2)(k) of the *Labour Relations Act*, it makes sense to bar the SEIU from reapplying to represent the employees at the clinic or Bayshore home care workers until the Board determines the PSLRTA application and I so order.

2112-07-R Communications, Energy and Paperworkers Union of Canada, Local 2003, Applicant v. **GreenField Ethanol Inc.,** Responding Party

Bargaining Unit – Certification – Trade Union – Local 2003 applied for a craft bargaining unit of operating engineers and the employer took the position that Local 2003 did not have craft union status and accordingly the bargaining unit applied for was not appropriate – The core issue turned on the effect of a merger between CUOE, which had craft union status, and CEP in 2003 – The Board found that Local 2003 was a craft union for three reasons: first, by the time it had applied for certification it had a four year history of bargaining for the craft; second, the history of CUOE was relevant to the determination, including its craft status which the Board found can flow to a successor union under s. 68 of the Act; and third, Local 2003's representation of exclusively operating engineers bargaining units was not so watered down that it was no longer a craft union – Certificate issued

BEFORE: *Brian McLean*, Vice-Chair.

DECISION OF THE BOARD; October 27, 2009

1. This is an application for certification. Further to a decision of the Board dated October 10, 2007, a representation vote was held in this matter. At the vote, a majority of those casting a ballot voted in favour of representation by the applicant. The issue in this case which required a hearing arises out of the fact that the applicant has applied for a craft bargaining unit of operating engineers. The applicant claims to be a craft union, but this is disputed by the employer.

2. The responding party, GreenField Ethanol Inc., is a producer of Ethanol with operations in Ontario, Quebec and the United States. The operations that are at issue in the application for certification are located in Chatham, which is a manufacturing facility for various grades of ethyl alcohol and the co-products: "dried distillers grains" and CO_2.

3. The responding party's Chatham facility employs approximately 80 employees, six of whom have been identified by the applicant as operating engineers. The job functions of the operating engineers at the responding party's facility involve: making air and steam, cooling water and distributing electricity. Operating engineers are required to hold a certificate of qualification and a second class engineer license.

4. This application requires an analysis of whether a craft unit of operating engineers, is an appropriate bargaining unit, pursuant to section 9(3) of the Act. Central to that determination is an analysis of whether Local 2003 is a craft union. The applicant claims that it has craft union status for bargaining on behalf of operating engineers and therefore the unit that is the subject of this application is appropriate. The responding party is of the view that Local 2003 does not have craft union status and therefore the proposed bargaining unit in the application for certification is not appropriate.

5. The relevant provisions of the Act reads as follows:

> 9. (1)Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

...

> (3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union practice are commonly associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

6. In *Art Wire & Iron Co. Ltd.* (1954, 54 CLLC ¶17,080), the Board determined there are three conditions necessary to establish the existence of an appropriate craft bargaining unit:

> 1. The group of employees concerned exercise technical skills or are members of a craft by reason of which they are distinguishable from other employees;
>
> 2. the group of employees concerned commonly bargain separately and apart from the other employees through a trade union that, according to trade union practice, pertains to such skills or craft; and,
>
> 3. the application for certification is made by a trade union pertaining to such skills.

7. The employer did not dispute that the operating engineers named in the bargaining unit description exercised technical skills or that they had had core duties that were regulated by the *Technical Standards and Safety Act, 2000* (hereinafter "TSSA"). Further, the parties agreed that such employees have been traditionally recognized by the Board as an eligible craft unit. There is therefore no dispute that the first condition is satisfied.

8. In my view, condition two is also plainly satisfied in these circumstances. Stationary engineers have a long history of bargaining separately and apart from other employees and being represented by operating engineer's trade unions including the predecessor of the applicant. Indeed, in *Kidd Creek Mines Ltd.*, [1984] O.L.R.B. Rep. March 481, which is relied on by the employer in this case for other purposes, the Board noted that stationary engineers are one of the traditional crafts that have a history of separate bargaining in industrial settings and have been entitled to craft bargaining units.

9. Most of the parties' arguments focused on the "trade union practice" component of the second condition and the third condition, that being whether Local 2003 is a trade union "pertaining to such skills or crafts". In order to understand the arguments it is necessary to know the history of Local 2003 and (arguably) its predecessor, the Canadian Union of Operating Engineers and General Workers ("CUOE").

10. The CUOE has a long history as a trade union in the province. It was founded by stationary engineers in or about the early 1960s. However, in 2003 the CUOE decided to merge with the Communications, Energy and Paperworkers Union ("CEP").

11. The employer's argument is that the CUOE merged with the CEP (rather than Local 2003) and, as a result, lost its craft status. In making this argument it relies on a number of documents which state that CUOE was merged with CEP. It is not necessary to set out each of these documents in detail. However, suffice it to say that:

i) The minutes of the meeting where the CUOE agreed to merge with the CEP state in relevant part:

- The reading of the minutes was dispensed with since the only item on the agenda was out proposal for a merger with the Communications, Energy and Paperworkers Union of Canada (CEP).

ii) The parties to the merger agreement are CEP and CUOE and the merger is said to be "with respect to a merger between CEP and CUOE". The agreement also states:

- As of the effective date of the merger, the CUOE will be known as CEP Local 2003.
- The President of the CEP shall cause to be issued a charter of the CEP in name of Local 2003.
- All assets and liabilities of the CUOE shall be the responsibility of CEP Local 2003.

iii) A letter dated August 11, 2008 to the CUOE President Gordon Partridge welcomes him to membership in the CEP.

iv) The relevant letter to CUOE's members advised them they are members of CEP

v) The CEP advised the Ministry of Labour's Office of Arbitration that they merged with CUOE.

12. The CEP created Local 2003 on July 8, 2003 the date the Merger Agreement was signed. On the date that the merger took effect, September 1, 2003, the CUOE's bargaining units and members were immediately assigned to Local 2003.

13. The parties agree that CUOE held craft union status before it merged with CEP.

14. The applicant asserts that the Merger Agreement took effect on September 1, 2003 and the rights of CUOE flowed directly to CEP Local 2003. Notice of the merger was sent to the employers with whom CUOE had bargaining rights and those employers have subsequently become bound to collective agreements with CEP Local 2003. The position of the applicant is that the merger resulted in CEP Local 2003 assuming the bargaining rights under collective agreements negotiated by the CUOE and Local 2003 therefore also assumed CUOE's craft union status.

15. The parties agree that CEP Local 2003 is currently party to approximately forty-six collective agreements. They also agree that approximately twelve of those collective agreements are "pure" craft units of operating or stationary engineers. The remaining units may be comprised of operating or stationary engineers but include other types of employees, making them non-pure craft units. Of those perhaps, six bargaining units are primarily operating engineer units with only a few employees that occupy non-engineer technical positions. Some of the agreements cover "all employee" bargaining units.

16. Counsel for the responding party relies on the Board's decision in *Kidd Creek Mines Ltd., supra.* In *Kidd Creek Mines Ltd., supra,* the applicant was unable to demonstrate that it had the necessary collective bargaining experience to establish that trade union practices of the IBEW were commonly associated with maintenance electricians in mining operations or even more broadly in the manufacturing industry. In coming to this conclusion the Board made the following comments in suggesting that s. 6(3) (now 9(3)) will be narrowly interpreted:

> 56. Legislative protection for craft bargaining units was initially based upon the bargaining structures and rivalries of the 1930's and 1940's and after the war similar provisions crept into provincial legislation. However, requirements such as section 6(3) are now relatively uncommon. Because of problems associated with the proliferation of bargaining units in industrial enterprises, federal policy has now shifted away from craft units. In fact, the trend is in the opposite direction. It has been recognized that in a modern industrial context craft units will generally be inappropriate. Following the recommendations of the Woods Task Force in 1968, federal legislation was amended to delete the provisions protecting craft bargaining units, and the circumstances in which an existing unit will be splintered are now closely confined (see *Feed-Wright Ltd.*, [1979] 1 Can. L.R.B.R. 296; *Atomic Energy of Canada Ltd.*, [1978] 1 Can. L.R.B.R. 92; and *Cablevision Nationale Ltee*, [1979] 3 Can. L.R.B.R. 268 and cases referred to therein). In British Columbia craft units will be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in manufacturing. As we have already noted, while this case was being litigated the British Columbia Labour Relations Board was considering whether to merge an I.B.E.W. bargaining unit at MacMillan-Blodell into an existing industrial bargaining unit, thereby eliminating alleged industrial relations instability. Thus, while section 6(3) has deep historical roots, it is now something of an historical anomaly.
>
> 57. Nor are the protections offered by section 6(3) absolute. An examination of the statutory language indicates that it has been carefully drafted to preserve the status quo. It is a recognition of historical organizing patterns, rather than any general endorsement of craft bargaining units. Those historical criteria are built right into the section itself, and must be satisfied before it has any application. Section 6(3) is available only *if* the group of employees whom the union seeks to represent *already commonly* bargain separately and apart from other employees; and only *if* the applicant trade union has traditionally represented employees with those skills. Both conditions require the Board to look to the collective bargaining system for historical precedent to establish that the separate bargaining is already "common", and that the union's representation of these employees is in accordance with "established practice". *These conditions effectively*

preclude the development of new craft unions and, in our view, limit the extension of craft bargaining patterns beyond their traditional boundaries. It is also interesting to note that even if these criteria are met, the section need not be applied where the union seeks to "carve out" a craft group from an existing bargaining unit. This latter qualification is legislative recognition of the bargaining problems which might result from multiplying the number of bargaining units in an industrial enterprise; and whether fragmentation arises because the system grows in a piecemeal fashion or is subsequently carved up, the industrial relations problems are the same.

[emphasis added]

...

62. In ordinary parlance, "common" means prevalent, widespread, general, well-established, regular, ordinary, or routine, - as opposed to sporadic, irregular, infrequent, or uncommon. However the word only takes its meaning against some established background with which the particular situation can be compared. Snowstorms are "common" in Canada, but are "uncommon" in summer. What makes snow uncommon in the latter case is that when one establishes the context – summer, or previous summers – a snowstorm stands out as unusual. It is a question of relative frequency which can only be determined against some established norm. Likewise, to determine the intended meaning of "common" in section 6(3) (i.e., to assess how common a union's bargaining practice actually is) one must necessarily delimit a field of bargaining behaviour against which the situation of the employees in question can be tested. To do that, it is helpful to refer to the purpose of section 6(3), for as we have noted, section 6(3) was intended to preserve rather than extend craft representation rights. It was meant to protect craft rights where they were already commonly established. At the very lest, this requires the union to show that it commonly bargains for electricians like these separately and apart from other employees in the industry in which the certification application is made, or related industries; or, alternatively, that it commonly bargains separately and apart for electricians like these in the collective bargaining system as a whole, even if not in the particular industry in question. These are the reference points which appear to us to be most consistent with the thrust and terms of the section.

63. The applicant here meets neither test, nor indeed most of the other possible alternative constructions of the common bargaining requirement. It does not *commonly* bargain separately for maintenance electricians in bargaining units in mining or manufacturing. By and large there are no electricians' craft units in the context. Where organized, most maintenance electricians fall within industrial bargaining units – in the mining industry usually represented by the United Steelworkers of America, in the auto industries by the United Autoworkers, in the rubber industry by the Rubber Workers' union, and so on. Of the 170 operating mines in Canada, the I.B.E.W. can point to only one – Hudson's Bay mining and smelting – where it has an established presence. Even there, it bargains together with a number of other trade unions, and the bargaining unit it represents it not a pure unit of electricians for whom the I.B.E.W. bargains by themselves, but a mixed group of electricians and others. We do not know how many mines

> there are in the United States, but there must certainly be many many more than in Canada. Yet the union was able to find only a half a dozen instances where the I.B.E.W. had a foothold and, again, a number of the agreements suggest both common bargaining with other trades and bargaining on behalf of both electricians and other employees (i.e., *not electricians* separately and apart).

17. The employer relies heavily on paragraph 57 of the *Kidd Creek* decision and in particular the statement that "these conditions effectively preclude the development of new craft unions and, in our view, limit the extension of craft bargaining patterns beyond their traditional boundaries." However, in my view, the *Kidd Creek* decision says nothing about whether a craft union can merge with another union and retain its craft status. More importantly, the Board must in the end make a determination about whether the criteria established by s. 9(3) have been met. The issue is whether the applicant can establish whether at the time of application that it is a trade union pertaining to the relevant "skills or craft".

18. The responding party also notes that the current practice of the Board has been to move away from small bargaining units in industrial settings with a shift toward broader based bargaining units and argues that the Board should find that a craft bargaining unit was inappropriate in this instance for that reason: the Board should discourage new craft bargaining units. The union acknowledges that the Board recognizes the history of craft bargaining units and the move toward broader and more inclusive bargaining units in the modern industrial context. The legislation however continues to protect traditional craft bargaining units on a limited basis as is set out in section 9(3) of the Act.

19. In my view Local 2003 is a craft union. I come to that conclusion for three reasons.

20. First, Local 2003 itself had at the time of the application for certification a four year history of bargaining for the craft. This is sufficient to establish that it is a craft union.

21. Second, in my view, the history of the CUOE is relevant to determine whether the union meets the test set out in s. 9(3) of the Act. The employer argued that s. 68 of the Act precludes this result. Section 68(1) states:

> **Declaration of successor union**
> 68.(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

22. There is no indication in the language of section 68 of the Act that would disallow CEP Local 2003 from acquiring the bargaining rights previously held by CUOE as a successor union resulting from a valid merger. In my view, one of the rights or privileges that can flow to a successor union under s. 68 is its craft status. The employer's argument that CUOE merged with CEP is

technically true, but is not determinative. The fact is that CUOE became Local 2003 at the moment of the merger, a Local that had been created by CEP for this express purpose. Further, the bargaining history that dates back to 1960 is part of what was assumed by CEP Local 2003 (as a privilege, not a statutory right) and that history has not been lost in the merger transaction.

23. The employer asserts that bargaining rights are not a species of private property. They may not be sold, leased, transferred or disposed of. I agree (see *Brick. and Allied Craft Union of Canada*, for example). That is why s. 68 was placed in the Act. It permits, on a merger or amalgamation or transfer of jurisdiction, the Board to substitute one union for another in a bargaining relationship. The bargaining right and privileges possessed by the successor union are no greater than, or less than the rights and privileges formerly possessed by the predecessor union.

24. Counsel for the responding party also drew attention to the differences in how CEP Local 2003 is governed in comparison to its predecessor CUOE and noted various discrepancies in their Charter wording. I do not agree that this is relevant to my determination. Despite some of the discrepancies noted by the responding party, the constitution of CEP Local 2003 gives it identical jurisdiction as was set out in the constitution of CUOE prior to the merger.

25. Industrial labour relations unions are not given craft status by the Board or otherwise. The only issue is whether they meet the criteria set out in s. 9(3). Nothing in s. 9(3) or s. 68 precludes the Board from assessing whether a predecessor's collective bargaining history should be relied on in deciding whether the successor union's bargaining and representation history can be relied on in deciding a determination under s. 9(3). I see no reason why it cannot.

26. Third, in my view Local 2003's representation of exclusively operating engineers bargaining units is not so watered down so as to say that it is no longer a craft union. Pure operating engineers bargaining units remain a significant portion of the union's bargaining rights.

27. This conclusion is supported by the Board's decision in *Niagara Falls Imax Theatre*, [1995] OLRB Rep. October 1273 at para. 18, indicates:

> The Board does not gauge bargaining history by looking at how many bargaining units an applicant has or the number of collective agreements reached. The issue for the Board is the quality of the bargaining history: Among other factors the Board may consider who the applicant has represented historically, how long that history is, and whether the applicant has been consistent in maintaining its practice of representing only those for whom it is claiming craft status.

28. The Board finds that CEP Local 2003 at a minimum has, since September 2003 established its own history as a craft union acting as bargaining agent for at least 12 pure craft bargaining units of operating or stationary engineers, which is approximately one quarter of the composition of all bargaining units it represents. Several other units are primarily operating engineers bargaining units, although because of the addition of one or two specialized employee classifications, they are not "pure". This history of more than four years is sufficient on its own to establish CEP Local 2003 as a craft union that pertains to operating or stationary engineers.

29. Having regard to the agreement of the parties, the Board further finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

> all operating engineers employed by GreenField Ethanol Inc. in its facilities in the City of Chatham save and except the Chief Operator and persons above the rank thereof.

30. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

31. A certificate will issue to the applicant.

32. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

33. Meeting and hearing dates set previously are hereby cancelled.

34. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted until the date that had been set for the hearing.

1438-09-G International Association of Heat and Frost Insulators and Allied Workers, Local 95, Applicant v. **Insulcana Contracting Ltd.,** Responding Party and The Master Insulators' Association of Ontario Inc., Intervenor

Construction Industry Grievance – The union grieved the employer's basis for calculating travel pay for workers dispatched from either Sarnia or Windsor to Sault Ste. Marie – The collective agreement provided for the calculation of travel time as "established in the Canadian Automobile Association maps for the Province of Ontario" – The employer argued that since the CAA maps suggested a shorter route through Michigan, rather than the longer route on exclusively Ontario roadways, travel time was payable for the lesser hours – The Board held that to allow the employer to use the shorter, Michigan route would require a reading out of the words "maps for the Province of Ontario" from the collective agreement – Further, the collective agreement itself had as its scope the "Province of Ontario" a using the Ontario-only calculation would not require consideration of a worker's personal circumstances (i.e. their ability to travel through the U.S.) – Grievance allowed

BEFORE: *Susan Serena*, Vice-Chair.

APPEARANCES: *Elizabeth Mitchell* and *Jim Bowman* for the applicant; *Walter Thornton* and *Pat Desmarais* for the responding party; *Walter Thornton, Scott Van Camp* and *Dave Thomas* for the intervenor.

DECISION OF THE BOARD: September 15, 2009

1. This is a referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The referral was made on August 19, 2009.

2. At the urging of the Board, the parties agreed to bifurcate the hearing to permit the Board to deal solely with the principal issue in dispute, namely the proper interpretation of Article 10.14(b) of the collective agreement dealing with the calculation of Travel Pay, while remaining seized of all the other issues that have been raised by the parties in this matter, including the union's claim for bus fare under Article 10.14(a), the calculation of any damages and the responding party's claim to recover an overpayment.

3. For the purpose of this grievance referral and the union's claim for travel pay, the pertinent provision of the collective agreement is of Article 10.14(b) which reads as follows:

> 10.14(b) When an employee is dispatched to a job site location (project) he or she shall receive Travel Pay at the appropriate straight time rates of pay for the total Travel Time as established in the Canadian Automobile Association of (sic) maps for the Province of Ontario which indicate the total distance between points based upon driving at the established speed limit for the route used (highways and roads, etc.):
>
> (i) going to the job site location (project) at the commencement of employment thereon; and
>
> (ii) coming from the job site location (project) when the project is completed and/or when the term of employment of an employee is ended or such employee is transferred from the job site location (project).
> ...

4. The facts are not in dispute. In response to a request from the company for workers the union dispatched six workers from Sarnia and one worker from Windsor to a project located in Sault Ste Marie, Ontario. The question for the Board is whether under the collective agreement these workers are entitled to travel pay calculated on the basis of the shorter route which travels through Michigan ("Michigan route") or the shortest route through Ontario ("Ontario route") ?

5. The parties agree that the proper method for determining the travel time between two locations for the purpose of calculating travel pay under the collective agreement is to use the maps and direction finder ("TripTik®") on the Canadian Automobile Association (CAA) website to obtain the estimated total travel time between the two locations. The parties also agree that when either Sarnia or Windsor is identified as the departure point and Sault Ste. Marie as the destination the route/distance/estimated travel time provided by the CAA uses a route that passes through Michigan. To obtain the route that travels solely through Ontario the user must also input another location (e.g. Barrie or Sudbury) that is along this route. The CAA site indicates the total distance and estimated travel times for each route is as follows:

	Total Distance	Estimated Travel Time
Sarnia to Sault Ste. Marie through Michigan:	564.9 km	5 hours, 9 minutes
Sarnia to Sault Ste. Marie through Ontario:	938.1 km	11 hours, 42 minutes
Windsor to Sault Ste. Marie through Michigan:	560 km	5 hours, 4 minutes
Windsor to Sault Ste. Marie through Ontario:	1017.7 km	12 hours, 39 minutes

6. It is the union's position that the collective agreement requires travel pay to be calculated using the Ontario route because the plain and ordinary meaning of the phrase "maps for the Province of Ontario" means travel within Ontario and to adopt the company's position would require this phrase to be read out of the collective agreement. The union also relies on the Preamble which indicates the purpose of the collective agreement is to govern the "wages and working conditions applicable to all work performed within the jurisdiction of the Union in the Province of Ontario" and Article 1.05 of the collective agreement which identifies the geographic scope of the collective agreement as the Province of Ontario. Alternatively, the union submits that the company is not entitled to simply select the shortest route without regard to the personal circumstances of each worker and it must take into consideration the reasons why the worker did not travel through the U.S. (e.g. whether the worker has a passport, criminal record or is transporting tools).

7. The company submits the language of Article 10.14(b) is clear and does not say that travel pay must be calculated on the basis of a route solely through Ontario. Rather, the company submits the parties have negotiated a process for calculating travel pay that directs the parties to use the CAA maps for the Province of Ontario (TripTik®) website to determine the travel time between two points and using that process the travel time for the Michigan route is supplied. The company does not assert that the workers must actually use the Michigan route or that they are entitled to additional travel time if they are required to take a different route because Article 10.14(b) sets out the methodology for determining travel time for the purpose of calculating travel pay.

8. The parties also agree that it was trite law that in its role as a board of arbitration the Board is obliged to interpret and apply the language of the collective agreement before it and is not entitled to amend the collective agreement or imply an obligation that the bargaining parties did not negotiate.

9. A general rule of construction when interpreting a collective agreement is to give meaning to all the words in the agreement, and avoid an interpretation that renders a word or phrase redundant (see *Brown and Beatty: Canadian Labour Arbitration*, 3rd Ed. P.427). Like any other type of contract, a collective agreement should be construed as a whole, giving effect to all of its terms, so long as this does not result in an absurdity: (*Holt v. Corporation of the City of Thunder Bay* (2003) 65 O.R. (3d) (C.A.) at pg. 263).

10. Underlying each party's principal position is recognition that through Article 10.14(b) the parties were endeavouring is to create a simple and straightforward way in which to calculate travel pay that did not require consideration of the individual circumstances of the worker or the actual route used and time required for the worker to travel to the job site location. Towards that end the parties agreed that travel pay is to be calculated on the basis of the "total travel time as established in the Canadian Automobile Association of (sic) maps for the Province of Ontario which indicate the total distance between points and the total elapsed time of driving between points based on driving at the established speed limit for the route used". The parties further advised the Board that the TripTik® function on the CAA website is the proper resource for obtaining the travel time between two locations to calculate travel pay under Article 10.14(b) of the collective agreement. The evidence before the Board is that the default route used by TripTik to determine the travel time and distance between Sarnia or Windsor and Sault Ste. Marie is the route through Michigan but the total distance and travel time for a route through Ontario can be obtained by adding an interim destination that is along the Ontario route.

11. To adopt the position of the employer requires the words "maps for the Province of Ontario" to be read out of Article 10.14(b) of the collective agreement. If the sole objective of the parties when they drafted Article 10.14(b) was to refer to the CAA TripTik® by describing the information this function provides to the user (e.g. total distance between points and total elapsed time of driving) it was unnecessary to include the words "maps for the Province of Ontario", particularly in circumstances where the geographic scope of the collective agreement is limited to projects that are located in Ontario. Furthermore, in order to give all the words used in Article 10.14(b) meaning and using a plain and ordinary meaning to the words "maps for the Province of Ontario" the Board can only conclude that this phrase was included to ensure that travel time and travel pay is calculated on the basis of a route on maps for the Province of Ontario and not a route that passes through another jurisdiction.

12. For the reasons set out above the Board adopts the interpretation of Article 10.14(b) advanced by the union and grants the grievance insofar as travel time between Sault Ste. Marie and Windsor or Sarnia is to be calculated on the basis of the total estimated travel time for the applicable Ontario route.

13. The Board will remain seized of the other issues raised by this grievance, including if necessary the calculation of any damages. The parties are to notify the Registrar within 30 days of the date of this decision if they require further hearing dates failing which this grievance referral will be deemed terminated without further notice to the parties.

1718-09-HS; 1720-09-HS Loblaw Companies Limited, Applicant v. United Food and Commercial Workers International Union, Local 1000A and Shela Mirza - Inspector Ministry of Labour, Responding Parties

Health and Safety – The employer sought suspension of an inspector's order requiring it to comply with the Industrial Regulation relating to overhead protection on rack tunnels where openings could allow falling materials to endanger workers passing under them – The trade union took no position on the suspension – The Board found the suspension would

not threaten the health and safety of workers given the following undisputed facts: that the rack tunnels are in relatively low traffic areas; the high quality of the pallets used; the installation of safety bars making it impossible for skids to fall through the openings; the plastic wrapping of the pallets and product; the training and inspection duties; the racks meeting CSA requirements; and the 14-year no accident record from falling material involving a racking tunnel – Additionally, the operational prejudice could be significant and the Regulation left open to interpretation whether the employer's precautions will qualify as compliance with the requirements of the Regulation – Order Suspended – Appeal to be heard

BEFORE: *John D. Lewis*, Vice-Chair.

DECISION OF THE BOARD: October 7, 2009

1. Board File No. 1720-09-HS is an appeal filed by Loblaw Companies Limited ("the applicant" or "Loblaw"), pursuant to section 61(1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O-1 as amended (the "Act") of an Order made against it by Inspector Shela Mirza under the Act on August 26, 2009, in Field Visit No. 5527804.

2. Board File No. 1718-09-HS is an application filed with the Board to suspend the Order in accordance with section 61(7) of the Act pending the Board's determination of the applicant's appeal in Board File No. 1720-09-HS. This decision deals only with the suspension request.

3. Order No. 1 (2516648), dated August 26, 2009 is in issue and references section 35 of the Industrial Establishments Regulation of the Act. The Order states as follows: "The employer shall provide overhead protection on the rack tunnels where openings can allow falling materials to endanger workers passing under them."

4. Section 35 of Ontario Regulation 851 R.R.O 1990, as amended, is found in the Regulation in a section with the heading "Machine Guarding" and reads as follows "Overhead protection shall be provided where falling material may endanger any worker".

5. The Inspector in the narrative portion of her Field Visit Report commented as follows: "During the visit, it was observed that the rack tunnels are not equipped with overhead protection to prevent skids and materials from falling though the openings which workers pass under. Order issued."

6. Although not mentioned specifically in the Field Visit Report, Loblaw, in its suspension application states that it understands the Inspector is ordering it to install a wire mesh (also referred to a "decks") in the ceiling of each of the rack tunnels. The Ministry of Labour, on behalf of the Inspector, in its response does not take issue with Loblaw's understanding as to what the Inspector wants the company to do.

7. Loblaw indicates that there are approximately one-hundred-and-forty-six (146) rack tunnels at the Distribution Centre/Warehouse that is the subject of Order No. 1. Modifying each rack tunnel would require the installation of three wire mesh decks, for a total installation of approximately four-hundred-thirty-eight (438) mesh decks. Loblaw asserts that in complying with Order No. 1 it will have to incur an expense of $90,000 to install the mesh decks and incur significant operational disruption to its Distribution Facility which will also affect the retail stores it supplies.

8. The applicant seeks the suspension of Order No. 1 and the maintaining of the *status quo* as it concerns the rack tunnels pending the hearing of its appeal on the merits. In this regard, Loblaw submits that it has already a number of safety precautions in place that provide more than reasonable protection for its employees.

Analysis

9. The applicant in this matter operates a large Distribution Centre ("D.C"), in Mississauga. The respondent union, UFCW Canada, Local 1000A, is the exclusive bargaining agent for the non-managerial employees at the D.C., of which there are approximately 284.

10. At the D.C., steel racking is used for the storage of product. At various locations in the D.C., racking is configured to provide stacking of product over pathways. These pathways are referred to as "rack tunnels".

11. The rack tunnels are composed of large metal racks upon which pallets of product are stored. Multi-layer racks run along side one another to create aisles. The aisles are bridged overhead by further racking, creating a tunnel. The tunnels are not high-traffic areas. From beneath, the racking looks like two lengths of steel, bridged by a cross-piece, at intervals of approximately every thirteen feet.

12. Loblaw asserts that the rack tunnels already have significant safety precautions that the Inspector was not aware of that provide more than reasonable protection for the employees that pass underneath.

13. One such safety precaution is that Loblaw has installed safety bars on the underside of the rack that forms the ceiling of each rack tunnel. The safety bars are spaced such that the distance between them or between a safety bar and a rack cross-piece is no more that approximately thirty-eight inches. It is impossible for a loaded or unloaded pallet to fall through the space.

14. It should be noted that in its response, the Ministry of Labour, on behalf of the Inspector ("the Ministry"), concedes that, due to the pallets size, a skid cannot fall through the thirty-eight inch openings. However, the Ministry assets that there remains a danger that material/product on the skids may fall through the openings.

15. Another safety precaution asserted by Loblaw is that pallets are never placed on the rack tunnels empty, but are stacked approximately six feet high with product. In this regard, the pallet and product are completely wrapped in clear stretch plastic, including all corners at the top and bottom. As such, the plastic wrapping prevents any individual product from falling into the openings in the rack tunnels.

16. In its response, the Ministry asserts that the shrink wrap can be easily torn or damaged while skids are being loaded onto or removed from the racking system. As such, items may become loose and fall from a skid.

17. A further protective measure to ensure pallets do not fragment and send pieces down onto employees that may be passing underneath is that only the highest quality pallets are used for storage of product in the reserve racking areas (which includes all racking over the rack tunnels). Further,

Loblaw has instructed the Inventory Control Manager to verify that only CHEP or CPC pallets are accepted into the D.C. storage in the reserve racking area. In addition, forklift operators are instructed to verify that only these high quality pallets are placed into reserve racking.

18. Supervisors of the D.C., as part of their daily duties must inspect their department. Such inspection duties include verifying that pallets in the racking conform with the above pallet standards. Also, the Joint Health and Safety Committee ("JHSC") members conduct monthly inspections. The JHSC also inspects that the proper pallets are used and that pallets are properly wrapped.

19. The Ministry's position is that a piece of a skid could break while being placed, moved or stored and may fall through the openings in the rack tunnel.

20. Loblaw points to the fact that in the fourteen year history of operating the D.C., a review of all workplace injury claims and first aid reports does not reveal one single case in which an employee has been injured by material falling on them while they were in or near a racking tunnel. Loblaw also notes that in its fourteen year history operating the D.C. no health and safety inspection has ever been initiated by any employee due to complaints regarding falling material from the racking tunnels, including the field visit of August 26, 2009.

21. Loblaw also points to the fact that while there is no formal standard for metal racking in Ontario, the applicant's safety bars and racks used at the D.C. meet the racks Standards User Guide published by the Canadian Standards Association ("CSA").

22. The Ministry asserts that whether or not an accident has occurred in the past is not determinative of the existence of a hazard and cites the following authorities in support: (*R. v. C.H. Heist*, unreported, September 6, 2000, Ont. C.S., Hornblower J.; *Budd Canada Inc. v. CAW and Ministry of Labour* [1999] O.O.H.S.A.D. No. 280 (December 15, 1999)).

The Decision

23. Section 61(7) of the Act reads as follows:

> **61.** (7) On an appeal under subsection (1), the Board may suspend the operation of the order appealed from pending the disposition of the appeal.

24. The factors the Board considers in determining whether to suspend the operation of an Inspector's order are:

> (a) whether the suspension of the order would endanger worker safety;
>
> (b) whether the employer would be severely prejudiced by not suspending the operation of the order; and
>
> (c) whether there is a *prima facie* case for a successful appeal of the order.
>
> (See *R.J. Dungey & Sons Ltd.*, [1999] OLRB Rep. January/February 82, at para. 17, and the decisions cited therein).

25. In addition to considering the above factors, the Board has shown deference to the Orders of Inspectors. In *General Motors of Canada Ltd.*, ([1997] O.O.H.S.A.D. No. 62 (June 2, 1999)) Adjudicator Herman observed the following:

> It is important that inspectors orders that are reasonably and properly made not be lightly overturned pending an appeal. The statutory scheme establishes the inspector as the decision-maker of the first instance, and the purposes of the Act are best served if his or her decisions prevail, in the absence of a persuasive reason otherwise, and pending the full application for review.

26. In its response, the responding party trade union takes the position that on the merits of the appeal the Inspector was correct in making Order No. 1. However, the trade union takes no position as to whether the requested suspension of Order No. 1 should be granted. As an aside, the Board notes that the trade union has also brought its own appeal involving other issues flowing from the same Field Visit No. 5527804 (see Board File No. 1848-09-HS).

27. The Ministry opposes the suspension request and identifies the potential exists that material/product could fall if the plastic wrap has been ripped or that a piece of a skid may break and fall through the opening in the rack tunnels. The Board agrees that these identified hazards exist. However, the Board is satisfied that the safeguards and training that are in place have thus far been effective in protecting the health and safety of workers at the D.C. from the identified hazards. The undisputed facts that the rack tunnels are in relatively low traffic areas; the high quality of the pallets used; the installation of safety bars making it impossible for skids to fall through the openings; the plastic wrapping of the pallets and product; the training and inspection duties involving the Inventory Central Manager, supervisors, forklift operators and the JHSC; the racks meeting CSA requirements; and the D.C.'s 14-year no accident/injury/first aid record from falling material involving a racking tunnel, collectively are persuasive reasons that support an interim suspension of the Order.

28. While deference is normally given to an Inspector's order (see *General Motors of Canada Limited, supra*), having carefully considered the application and applying the factors the Board considers in determining whether to suspend the operation of an Inspector's order to the circumstances of this appeal, the Board is persuaded it should grant an interim suspension of Order No. 1 pending the appeal.

29. Most importantly, based on the submissions of the applicant, the Board is satisfied that the safety of the workers will be protected, and is not endangered, if the Order against Loblaw is suspended. The fact that in the 14-year operational history of the D.C. and the racking tunnels no worker has ever been injured by material falling on them while in or near a racking tunnel is a significant factor. While the Board agrees with the Ministry that such a fact is not determinative, it is a fact in the given circumstances, that is deserving of significant weight. This fact, combined with all of the other safety precautions Loblaw has instituted, as identified in the above paragraphs, combined with the fact that the trade union representing the workers at the D.C. takes no position concerning the suspension of the Order, persuades the Board that in the interim the safety of the workers is not endangered.

30. The Board also notes that pursuant to Regulation 851, section 45, under the heading "Material Handling", Loblaw continues to have an ongoing statutory duty to:

s.45 Material, articles on things,

(a) required to be lifted, carried or moved, shall be lifted, carried or moved in such a way and with such precautions as will ensure that the lifting carrying or moving of the material articles on things does not endanger the safety of any worker;

(b) shall be transported, placed or stored so that the material, articles or things,

(i) will not tip, collapse or fall, and

(ii) can be removed or withdrawn without endangering the safety of any worker; and

(c) to be removed from a storage or a pile on rack, shall be removed in a manner that will not endanger the safety of any worker.

31. In this case, the Board is also satisfied that the applicant will suffer harm of the nature required in order to compel the Board to suspend the operation of the Order, if it is required to comply with the Order until the hearing of this appeal. Even though this is a relatively large company with significant net earnings, the operational disruption, more so than the monetary expenditure, is not insignificant. The operational disruption involved in the installation of the wire mesh decks at the D.C. and its impact on supply to the retail stores could be significant. This operational disruption would again have to be incurred by the applicant should it be successful on its appeal and choose to remove the approximately four-hundred-thirty-eight wire mesh decks .

32. Without the benefit of evidence and full legal argument on the merits, it is impossible for the Board to determine the merits of the appeal. The fact that section 35 of Regulation 851 is in a provision found in the Regulation dealing with "Machine Guarding" and speaks to "overhead protection", but yet does not define what that term means, leaves open to interpretation whether all of the safety precautions and training the applicant has taken, with respect to the racking tunnels, already qualifies as reasonable "overhead protection". However, in light of the Board's findings concerning the prejudice to the applicant and the interim suspension not endangering worker safety, the Board does not need to comment further on section 35 of the Regulation 851 in relation to the factor of establishing a *prima facie* case.

Disposition

33. On balance, based on the above facts, as well as the fact that the suspension request is not opposed by the trade union who represents the workers of the D.C., the Board is persuaded to grant the suspension request.

34. For the reasons set out above the application to suspend Order No. 1, Board File No. 1718-09-HS is granted. Board File No. 1720-09-HS is referred to the Registrar to be listed for hearing.

1087-09-R Labourers International Union of North America, Ontario Provincial District Council, Applicant v. **M3C Demolition Ltd.**, Responding Party

Certification – Construction Industry – Practice and Procedure – The Applicant union delivered the certification package to the registered corporate address of M3C which was the former residence of the President of M3C – Although M3C was conducting business from another residential address, the Applicant union was not aware of the new operating address and M3C had not changed its address as listed on the Ministry of Consumer and Business Services Corporation Profile Report – The Board found that the union effected proper delivery – M3C failed to provide the requisite information within the time stipulated by subsection 128.1(3) of the Act, and failed to file its response within the time stipulated by Rule 25.5 of the Board's Rules of Procedure – On the basis of only the information provided in the application the Board held that it should certify the applicant – Certificate issued

BEFORE: *John D. Lewis*, Vice-Chair.

DECISION OF THE BOARD: October 23, 2009

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"), that the applicant elected to have dealt with under section 128.1 of the Act. The application was filed on July 10, 2009.

2. The Board, in its decision of July 21, 2009, requested submissions from the parties concerning the issue of delivery raised in the responding party's letter of July 20, 2009. The responding party, in its letter to the Board of July 20, 2009 alleged that the application had not been properly delivered to the responding party. The Board has now received the written submissions from the parties concerning the delivery of the application.

3. In addition, the Board in its decisions of July 21, 2009 and July 31, 2009, provided the parties with an opportunity to file submissions concerning the late-filed Form A-72 Response to Application for Certification, which was filed on July 22, 2009 and the responding party's request to extend the time for filing the response. The response also contained the information required by section 128.1(3) of the Act. The Board has also reviewed the written submissions from the parties concerning this issue.

4. The Board has considered the respective written submissions and is now in a position to deal with the application.

Delivery of the Application

5. In its submissions, the responding party indicates that Mr. Matthew Cromwell ("Cromwell") is the President of M3C Demolition Ltd. ("M3C" or the "responding party") and that the address of 2 Montye Avenue, Suite #2 in Toronto is a house that had been converted into four (4) apartment units. This address was the former residence of Cromwell, however, Cromwell has not lived at that address since February of 2009. This address was also the registered corporate address of M3C.

6. The responding party states that Cromwell had made arrangements, for a period of one year, with Canada Post to have all of his mail, including the mail of M3C, forwarded to his new residence. Since the move from Montye Avenue, M3C has conducted business from another residential address at 1401 Dupont Street, Toronto and this new address is used on all cheques

including payroll. Significantly, the responding party does not assert that the applicant knew about its new operating address.

7. The responding party admits that the certification documents were contained in an envelope addressed to Cromwell and M3C at the Montye Avenue address. The responding party submits that the envelope containing the application materials gave no indication that the contents were legal documents that required a timely response. The Board notes that the envelope containing the application materials had the name and logo of the law firm retained by the applicant marked clearly on the envelope. The responding party also asserts the application documents, as well as the Board's envelope containing the Form B-59 Confirmation of Filing, had been found in the foyer of 2 Montye Avenue.

8. M3C submits that the applicant's Form A-75, Certificate of Delivery is inaccurate. The Certificate of Delivery states that the application documents were given to Data Rush Courier on July 14, 2009 for delivery by no later than 2:30 p.m. on July 14, 2009. The responding party indicates this must be inaccurate and refers to the Canada Post receipt attached to the Form A-75 which indicates a package was given to Canada Post on Friday July 10, 2009 at 17:06:12 p.m. Further, the tracking status form for the package shows that a M. Wonsbourgh signed for it. This is an individual not known to the responding party.

9. M3C alleges that it did not become aware of the application documents, as well as the Board's Form B-59, Confirmation of Filing, until a former neighbour contacted Cromwell on Saturday July 18, 2009 and indicated to him that there were several packages for him sitting on the foyer steps to his former residence.

10. M3C asserts that once Cromwell became aware of the packages, he took immediate steps to respond and on Monday July 20, 2009 engaged the assistance of a Labour Relations Consultant, who sent the July 20, 2009 letter to the Board on behalf of the responding party, advising the Board that the application had been delivered improperly to the former residence of Cromwell/M3C.

11. M3C submits that the Board should find that delivery of the application was improper and proceed to dismiss the application or, in the alternative, the Board should extend the time for filing a response based on the following grounds:

> (i) the application materials were delivered to a former residence of the President of the employer;
> (ii) the application package was signed for by a person unknown to the employer;
> (iii) the application materials were left in a common area;
> (iv) the envelope containing the application materials gave no indication that the contents were legal documents that required a timely response; and
> (v) the applicant signed an incorrect certification statement, on the Form A-75, submitted to the Board to certify the facts regarding the delivery of the application materials to the employer.

12. The applicant, in its submissions, provided a Corporation Profile Report on file with the Ministry of Consumer and Business Services that indicates the Registered Office Address and the Mailing Address for M3C to be 2 Montye Avenue, Suite #2, Toronto, Ontario, M6S 2G9. The

Corporation Profile Report also indicates that a Matthew Cromwell is both a Director and President of M3C.

13. In its submissions, the applicant indicates that it decided to use a courier company, Data Rush Courier, to hand deliver its application materials to the responding party at the company's registered office address, as identified in the Corporation Profile Report, as earlier attempts to obtain current contact information for the responding party had disclosed only a telephone number and no physical address or facsimile number.

14. In particular, the applicant had conducted an internet search on the website www.yellowpages.ca for M3C and its listed phone number. While there was an advertisement for M3C, no physical address, facsimile or any other contact information, other than the telephone number, was listed.

15. The applicant's submissions indicate that a complete application package was hand delivered to the responding party, to the address identified on the Corporation Profile Report, via Data Rush Courier on July 13, 2009 at 5:14 p.m.. The courier company confirmed delivery to the applicant via a contemporaneous email which indicated the package was delivered to the 2 Montye Avenue address and was signed for by Jim Verti, Landlord.

16. Despite the above delivery and out of an abundance of caution, so that there could be no argument as to whether the package was left at the exact address, the applicant's submissions indicate it decided to hand deliver a second complete application package of documents. Once again, using Data Rush Courier, the applicant requested Data Rush to again deliver the package to 2 Montye Avenue, Suite #2, Toronto, Ontario, M6S 2G9. The applicant provided the courier company with specific instructions that the package had to be delivered to the specific address location (i.e. the precise address indicated on the Corporation Profile Report) and no signature was required.

17. In its submissions, the applicant received email confirmation of delivery from the courier company advising that the package had been successfully delivered by sliding it under the door of unit #2 at the registered address provided, namely 2 Montye Avenue, at 2:14 p.m. on July 14, 2009.

18. As it concerns the Canada Post receipt filed by the applicant's counsel which accompanied it's Form A-75, the applicant states that the responding party has simply made a mistake and misconstrued what the receipt was referring to. The applicant states that the Canada Post receipt, attached to the Form A-75, is the proof required by the Board and the Board's Rules should an applicant union choose to file a construction application for certification with the Board using Canada Post's Priority Courier Service. The applicant identifies that at the end of the Form A-75 there is a note which provides as follows:

> **NOTE: APPLICANTS WHO FILED THEIR APPLICATIONS WITH THE BOARD USING CANADA POST'S PRIORITY COURIER SERVICE ARE TO FILE A COPY OF THEIR POSTAL RECEIPT WITH THIS CERTIFICATE OF DELIVERY.**

19. The applicant submits that the Board clearly received the application, as set out in the Board's From B-59, Confirmation of Filing, dated July 15, 2009. The Form B-59 identifies that the

application filing date was July 10, 2009, the date the applicantion was sent to the Board, as evidenced by the attached postal receipt, and in accordance with Board Rule 24.2 which states:

> **24.2** The date of filing is the date that a document is received by the Board. However, if an application is sent by Priority Courier, the date of filing is the date on which the application is sent (as verified by the Post Office).

20. The applicant submits that it has fully complied with the Board's Rules and Jurisprudence as it concerns the proper hand delivery of the application and requests the Board process the application for certification based only on the information provided in the application. The applicant submits that the fact that the responding party registered with Canada Post to have its mail forwarded is not relevant to the issue of whether hand delivery by courier to the corporate registered address is sufficient for the purposes of an application for certification to the Board. Obviously, if a responding party makes arrangements to have its mail forwarded by Canada Post, this will not result in hand delivered couriered packages being forwarded.

21. The applicant states that it had no knowledge of the fact that the application materials were delivered to a former residence of Cromwell. Further, the applicant states that the Board's Rules of Procedure do not require "service" on a person but rather delivery to a responding party. The applicant submits that the responding party has registered its address and the materials were delivered to that registered address. Whether that address is a personal residence in addition to being a registered place of business is not relevant to whether delivery occurred.

Decision Concerning Proper Delivery

22. Upon reviewing the submissions and the materials filed, it is apparent that the responding party has misconstrued the postal receipt that was attached to the applicant's Form A-75, Certificate of Delivery. The postal receipt does not in any way relate to the delivery of the application to the responding party but relates only to the method chosen by the applicant to file its application with the Board. Therefore, the fact that the Canada Post Track printout shows that a M. Wonsbourgh signed for the package is irrelevant and immaterial to the issue of proper delivery of the application on the responding party.

23. In addition, M3C's asserted ground that the envelope containing the application materials gave no indication that the contents were legal documents, that required a timely response, is irrelevant and immaterial to the issue of proper delivery. Neither the Board's Rules nor any of its prior jurisprudence imposes any legal requirement or duty to mark an envelope containing the application materials in such a fashion. In *Zzen Group of Companies Limited*, 2008 CanLII 67268 (OLRB) (December 11, 2008), the Board specifically rejected the notion that an application delivered in precisely the same type of envelope as used in the instant case, was somehow defective for failure to be marked in some other fashion. At paragraph 15 of the decision the Board reasoned as follows:

> The envelopes containing the application material in this case were delivered by courier with the name and logo of the law firm retained by the applicant marked on the envelope. Even a cursory examination of the contents of the envelope would have revealed the documents related to a legal proceeding before the Board. The consequence of the responding parties' submission, if accepted, would permit an employer to avoid its obligation to respond

> quickly to an application for certification because its staff is not prepared or able to open envelopes delivered to it on a daily basis in the ordinary course of its business. It seems to us an employer that carries on business must do what is necessary, either by employing or training employees, to deal with correspondence or packages that arrive on a daily basis.

24. It is the Board's view that the applicant did nothing to conceal or mislead as to what was in the envelope delivered to the responding party.

25. The application was properly filed with the Board on the application filing date of Friday July 10, 2009. As such, the Board's Rules of Procedure require an applicant to verify in writing (i.e. the Form A-75) that it has delivered the application and other material required not later than two (2) days after filing the application with the Board, Rule 24.3 of the Board's Rules of Procedure states:

> **24.3** An applicant must verify in writing that it has delivered the application and other material as required by these Rules by filing a Certificate of Delivery not later than two (2) days after filing the application with the Board. The Board will not process an application that fails to comply with this Rule and the matter will be terminated.

26. In this regard, the applicant has complied with the Board's Rules and has filed a timely Form A-75, Certificate of Delivery.

27. Rule 25.3 requires that the applicant must deliver the application and other required materials to the responding party not later than two (2) days after filing the application with the Board. Rule 1.5 (e) defines day to mean "any day of the week from Monday to Friday, excluding a statutory holiday and any other day the Board is closed." In this case, given the application filing date of Friday July 10, 2009, the applicant needed to deliver the application materials to the responding party by Tuesday July 14, 2009.

28. Rule 24.1 establishes when delivery of a construction application occurs as follows:

> **24.1** Applications and all other material required to be delivered under Part V of these Rules must be delivered in one of the following ways:
>
> (a) facsimile transmission;
>
> (b) Priority Courier;
>
> (c) hand delivery; or
>
> (d) any other way agreed upon by the parties.

29. The applicant's written submissions and attached documents indicate that the application and the required materials were hand delivered to the registered office address of the responding party, at approximately 2:30 p.m. in the afternoon of Tuesday July 14, 2009. M3C asserts such delivery to be improper as Cromwell, the President of M3C, no longer resided at the address. Further, the responding party asserts that the application materials were left in a common area (i.e. the foyer)

and that the Board should infer the applicant must have known that the Montye Avenue address was no longer occupied by the respondent given the second delivery.

30. The Board notes that the responding party's assertion that the application materials were found in the common foyer area does not expressly contradict the union's assertion that Data Rush Courier hand delivered and slid the application package under the door of the responding party's former address. It is understandable and quite feasible that a package delivered to an address, where that person no longer resides, could end up in the common foyer area of that address, later to be seen by a former neighbour. This is especially so, if the current tenant at that address is at a loss as to what to do with a package not addressed to the correct tenant. There is no specific allegation made by M3C that contradicts the email sent by Data Rush Courier to the applicant union indicating the envelope containing the application materials had been slid under the door at unit #2, 2 Montye Avenue. As such, the application package was delivered to the responding party company's registered office address, as identified in the Ministry of Consumer and Business Services Corporation Profile Report. Further, the Board does not agree with the responding party's submissions that an adverse inference can be drawn against the union as a result of the second delivery, to the effect that, the union must have been concerned that the location where the material was delivered was no longer occupied by the respondent. The union's explanation of delivering the application material out of an abundance of caution, so there could be no argument that the package had not been delivered properly to the exact address, as opposed to leaving it with the landlord, is entirely plausible and prudent.

31. In its jurisprudence, the Board has found that an application or other communication made in a proceeding under the Act will be found to have been delivered within the meaning of the Board's Rules at the time it has been delivered to the place where, and in the manner which a responding party carries on business and accepts commercial communications in the ordinary course of business (see *ICI Construction Management*, 2006 CanLII 973). While the Rules do not require personal service of a document, Rule 6.7 does require a document be "received" in order for it to be delivered. If a document is left at the premises of a responding party, in its mailbox or other receptacle used by that business for receipt of documents, the Board has determined that sufficient to establish that a document has been delivered, regardless of when it came to the attention of a representative of the party to whom it was addressed. (See *Professional Masonry Service*, [2000] OLRB Rep. Jan./Feb. 107 (February 22, 2000); *Norben Interior Design Ltd.*, [1984] OLRB Rep. June 851; and *Ferano Construction Ltd.*, [1985] OLRB Rep. Jan. 73.)

32. In *Norben Interior Design Ltd., supra*, the applicant delivered an application for certification to the post office box provided for a registered partnership. The Board stated at paragraph 7, "under the circumstances where a business address is provided for the public, the party which provided that address ignores and fails to advise itself of correspondence does so at its peril".

33. In *Professional Masonry Service, supra*, the Board confirmed that the Rules require *delivery* of an application for certification, not service, and further provides for three alternative methods of delivering an application, absent the agreement of the responding party, among which it is entitled to choose. An applicant is not required to justify its reasons for pursuing one alternative over another (at paras. 20 and 23). When the applicant chooses to deliver documents to a location that is the customary location where business documents are received by the responding party, the responding party is responsible for any risk associated with failure to receive documents at that location (para. 23). The Board in *Professional Masonry Service, supra*, found that the application had

been properly delivered to the respondent business even though, through no fault of either the applicant or the responding party, the application was not received by a representative of the responding party.

34. In *Kool Fab Mechanical Inc.*, [2005] OLRB Rep. Nov./Dec. 1011 (November 16, 2005), the Board discussed the issue of delivery and made this comment at paragraph 6:

> Although "delivery" does not require personal service on a representative of the company sought to be served and, as a result, delivery can be effected by either leaving the application in the company's mailbox or sliding the package under the door of the company's place of business, this did not occur. [emphasis added]

35. In *D & M Drywall Inc.*, 2005 CanLII 2695 (ON L.R.B.) (OLRB) (January 31, 2005), the Board heard evidence that the applicant had given the application for certification to Purolator Courier to be delivered to the responding party. Upon attempting to deliver the package to the address registered for the responding party on its Corporate Profile Report, the occupant at that address indicated that the responding party was not at that address and returned the package. The Board stated (at para. 5) "it does not matter whether the occupants are indeed the responding parties or their representative or not, the documents were given back to Purolator by someone at the address shown on the Corporate Profile Reports and these actions will be deemed those of the responding parties." The Board applied principles articulated in *Professional Masonry Service* and found that the delivery was sufficient for the purposes of the Board's Rules.

36. In *Blue Line Plumbing & Heating Ltd.*, 2006 CanLII 9919 (ON L.R.B.) (OLRB) (March 30, 2006), the application for certification was delivered to the address indicated on the corporate search by leaving it in a post box at the address entrance. The applicant also attempted to deliver the application by facsimile transmission but the connection was severed before the entire package was transmitted. The Board confirmed that an applicant can certainly rely on the hand delivery to the registered address. Whether or not the responding party 'discovered' the hand-delivered package immediately or not is immaterial to the issue of whether the application was properly delivered (at para. 6). The Board confirmed comments it had made earlier in *Black & McDonald Limited*, 2006 CanLII 4207 (ONLRB) (February 15, 2006), in this regard as follows:

> 8. The Board finds that the application and supporting materials were properly delivered to the responding party. How a party receives or handles its faxes and other correspondence in the ordinary course of business is a matter for it to decide. However, once a party sets up a process whereby it receives correspondence in the ordinary course of business at a particular address or fax number, any oversight in forwarding the correspondence to the right person in the organization, or a general failure to advise itself of received correspondence, is a business risk borne by that party. (citations omitted)

37. In *Eastern Drywall (2000) Inc.*, 2006 CanLII 21193 (ONLRB) (June 20, 2006), at paragraph 6, the Board comments that where a responding party uses its residence as its registered corporate address and an application for certification in the construction industry is left by a process server inside the front door, the Board again confirmed that its *Rules* do not require that documents be 'served' within the meaning of civil procedure but rather the Board's jurisprudence "has specifically declined to import and apply the concept of 'service' from the civil courts". The Board noted that

delivery is effected regardless of whether there is a representative present to receive a document and expressly adopted the analysis stated in *ICI Construction Management*, *supra*, at para. 11 as follows:

> ... The Board has reasoned that if a responding party in an application carries on business at an address and accepts commercial communications in a particular way, it accepts the risk of a loss or late receipt of such commercial communications.

38. The Board in *Eastern Drywall*, *supra*, at paragraph 7, confirmed that "[T]he responding party bears any risk associated with its failure to have measures in place to bring urgent matters to its principals' attention in a timely way".

39. At paragraphs six (6) and seven (7) of the *Eastern Drywall* decision, supra, of the Board adopted and applied the reasoning in the *ICI Construction Management* decision, *supra*, and restated that, if a responding party carries on business at an address and accepts commercial communications in a particular way, it accepts the risk associated with the loss or late receipt of such commercial communications. The Board has concluded that an application or other communication made in a proceeding under the Act will be found to have been delivered within the meaning of the Board's Rules at the time it has been delivered to the place where, and in the manner which, a responding party carries on business and accepts commercial communications in the ordinary course of business. The reasoning has been applied to a commercial office space, a residential address operating as corporate space, a mail box on the side of the road, a front door to a company's place of business or a fax machine. (See *Kool Fab Mechanical Inc.*, supra, *Norben Interior Design Limited*, *supra*; *Ferano Construction Ltd.* [1985] OLRB Rep. Jan. 73; *supra*, *Eastern Drywall*, supra., and *Professional Masonry Service*, *supra*.)

40. In a certification scenario, where a trade union has made a *bona fide* attempt to ascertain the operating address for a business, but has been unsuccessful, the union should be able to rely on, and take at face value, the registered office address information contained in a Corporation Profile Report on file with the Ministry of Consumer and Business Services for purposes of delivery. If a business has moved or has otherwise changed its registered address, it is wholly within its control to update such information with the Ministry. If a business does not take such action it continues to hold itself out to the public that the information originally filed with the Ministry continues to be accurate. In the case of M3C, it had sufficient time, approximately 4 months, in which it could have updated its corporate information with the Ministry but it chose not to do so. As such, M3C ran the risk that a person, absent specific knowledge to the contrary, could assume that the public registered address on record is the address where the company carries on business and accepts commercial communications in the ordinary course of business.

41. Where a business address is provided for the public and the party who provides that address ignores or fails to put reasonable and proper measures in place to advise itself of correspondence to that address it does so at its peril. In the present circumstances, M3C failed to take any measures concerning the forwarding of couriered/hand delivered correspondence and it was only out of sheer happenstance that a former neighbour contacted Cromwell about the packages left at M3C's former operating address.

42. In this case, the applicant made a *bona fide* attempt to ascertain the operating address of the responding party but was unsuccessful. Further, there are no alleged facts that indicate or that

otherwise could infer that the applicant knew the responding party's new operating address. As such, with no other address readily available or ascertainable, the applicant relied upon the registered office address and mailing address for M3C as provided in a Corporation Profile Report obtained from the Ministry of Consumer and Business Services. In these circumstances, the applicant properly hand delivered the application for certification to the responding party in accordance with the Board's Rules and jurisprudence. When the application materials were slid under the door to Unit #2, 2 Montye Avenue, that was sufficient to establish the application was hand delivered, regardless of when it came to the attention of a representative of the party to whom it was addressed.

43. In the circumstances of this case, the applicant chose to hand deliver the application documents to a location/address, which to the public, would be the customary location where business documents would be received. As a result, the responding party is responsible for any risk associated with the failure to receive documents at that location in a timely way.

44. As the Board has determined the applicant's second delivery to constitute proper delivery, the Board does not need to decide the merits of the first delivery. However, the Board does note that the first delivery occurred at 5:14 p.m. on July 13, 2009, which according to Rule 6.7 would be deemed delivered on the next day (i.e. July 14, 2009), if proper delivery had been effected.

Decision Concerning Late File Response

45. As the Board has determined that the applicant, on Tuesday, July 14, 2009 hand delivered the application for certification in accordance with the Board's Rules and Jurisprudence, the responding party's Form A-72, Response to Application for Certification, Construction Industry, was due on Thursday, July 16, 2009.

46. However, the responding party did not file its Response until Wednesday, July 22, 2009. As such, the Response was filed approximately four business days or six calendar days late. In this regard, the responding party has requested the Board extend the time for filing the Response. It should be noted that the substance of the responding party's Response is that on the date of application for certification, July 10, 2009, it had eleven (11) employees working at four (4) sites in Board Area 8. The applicant refers to only one common site and estimates that six (6) employees were at work in the unit described on the application date.

47. The applicant union opposes the responding party's request for an extension to file the Response and submits the Board ought to process the application for certification based only on the information provided in the application.

48. In its submissions, the applicant asserts that the Board does not have discretion to consider any of the required information filed beyond the two day time frame set out in subsection 128.1(3) of the Act. In this regard, the applicant relies upon the Board's reasoning in *Air Kool Limited*, [2005] CanLII 29029 (ON L.R.B.) (August 17, 2005).

49. In the alternative, if the Board finds it has discretion to consider the late filed information, the applicant asserts that the Board should not exercise its discretion, in the circumstances of this case, as the applicant has suffered prejudice due to the delay in filing.

50. The responding party, in its submissions, asserts that the reasoning in *Air Kool, supra*. was judicially considered by the Divisional Court in *Maystar General Contractors Inc.* v. *The International Union of Painters and Allied Trades, Local Union 1819*, (2007) 280 D.L.R. (4th) 692, and that the Court declined to follow the *Air Kool* case. The Divisional Court held that the Board does have discretion to consider late filed information beyond the two-day limit as set out in subsection 128.1(3) of the Act.

51. In its submissions, the responding party notes that the Divisional Court decision in *Maystar* was appealed, however, the Ontario Court of Appeal found the appeal moot. The responding party takes the position that subsequent to the decision in *Maystar*, by both the Divisional Court and Court of Appeal, the Board has had occasion to consider whether it has discretion to permit the filing of the information beyond the two-day time limit contained in subsection 128.1(3) of the Act. In this regard, the responding party relies on the following cases, post-Court of Appeal decision in *Maystar*, in support of the proposition that the Board can exercise its discretion to allow the late fling of materials under subsection 128.1(3) of the Act: (see *Christina Homes Ltd.*, [2008] OLRB Rep. Nov/Dec. 749 (November 20, 2008); and *Weathertech Restorations Services Inc.*, [2008] Rep. Nov/Dec. 8721).

52. The responding party also relies on *Weathertech*, *supra*, and *Carman Construction Inc.*, [2008] OLRB Rep. Jan./Feb. 1 (January 8, 2008), for the proposition that in exercising its discretion the Board has adopted a fluid approach and that no one factor is determinative.

53. At paragraph 94 of the *Weathertech* decision, *supra*, the Board stated the following:

> ... The Board will exercise its discretion to consider late-filed information having regard to all of the circumstances before it, but those circumstances must establish a compelling case for relief. As a result of the prejudice that typically accrues to trade unions in the construction industry when a late response is delivered and filed with the Board, the employer community must appreciate that the Board will be reluctant to exercise its discretion to consider late-filed information in the absence of those compelling circumstances.

54. In *Carman Construction Inc.*, supra, at paragraph 26 the Board held:

> ... the Board's experience allows it to take administrative notice of the fact that the ability of a union in the construction industry to ascertain accurate information about the factual basis for a responding party's position - particularly when the union is alleged to have underestimated the number of employees in the bargaining unit - diminishes rapidly as time progresses, and that delays of even one or two days may well lessen this ability in a meaningful way.

55. The Board also notes that in *R.O.M. Contractors Limited*, 2009 CanLII 15101 (ONLRB) (April 3, 2009), a differently constituted panel of the Board concurred with the conclusion reached in the *Christina Homes* and *Weathertech* decisions, that being the Board does have the discretion to accept both the response and late filed material under section 128.1(3) of the Act.

56. Assuming without deciding, the Board has the discretion to consider the information described in section 128.1(3) of the Act beyond the time fixed by that section of the Act, the responding party has not provided adequate grounds for the Board to do so in these circumstances.

57. The Board has commented on the factors that it should consider in deciding when it should exercise that discretion. At paragraph 10 of the *R.O.M. Contractors Limited* decision, *supra*, the Board listed the following factors:

> ... whether the employer has provided a compelling explanation that justifies the entire length of the delay; whether the employer responded immediately after becoming aware of the application; whether it can objectively be said that the employer would have filed a timely response; whether the union contributed to the delay; how long beyond the 2 day period the response was filed, and; the prejudice caused by the delay. Each case must be decided on its own facts. However, of these factors, the factor of whether the employer has provided a compelling explanation that justifies the entire length of the delay is the most important, and should be considered first by the Board.

58. The explanation provided by the responding party to justify the delay was that the application for certification was not properly delivered and the assertion that it moved expeditiously once it became aware of the application. The Board, for reasons outlined above in this decision, has determined that the application was properly delivered to the responding party.

59. While there may be some debate as to whether M3C moved expeditiously once it became aware, given that a Response was not filed until July 22, 2009, the Board finds that it was the responding party's actions, or more precisely its inactions, that allowed the application to go unattended for four working days, six calendar days before a Response was filed.

60. Assuming that the oversight of not updating M3C's new registered and mailing address with the Ministry of Consumer and Business Services, is an "innocent error", it is not a circumstance that was beyond the responding party's control. The responding party had approximately four (4) months in which it could have updated M3C's corporate information with the applicable Ministry. In the Board's opinion, inaccurate information on a Corporation Profile Report, which was within the responding party's power to have updated, is not an adequate reason for considering information provided beyond the time fixed by the Act.

61. If the responding party had organized its business affairs in a manner that allowed for correspondence, including the hand delivery of legal documents, to sit unattended for a significant number of days, it must accept the consequences of that action (see *Reids Uptown Homes*, [2007] OLRB Rep. May/June 633 (May 16, 2007) at paragraph 41).

62. Both the transitory nature of the construction industry and the short duration of its projects are also considerations the Board has referred to in previous decisions. Real prejudice arises in this case from the sought addition of three additional sites and a potential five (5) additional employees alleged to be working at these sites. Those four working days, six calendar days, may have allowed the applicant the opportunity to investigate.

63. In this case, the length and reason for the delay does not outweigh the prejudice to the applicant. The reasons advanced by the responding party are not compelling or persuasive and the

delay is significant in light of the prejudice to the applicant and the lost opportunity to investigate. Accordingly, the Board is not prepared to accept M3C's late filed Response which also contained the information required by section 128.1(3) of the Act.

64. The Board is prepared to proceed to determine this matter based on the information provided by the applicant with respect to the employees in the bargaining unit and without further regard to the Response filed beyond the time prescribed by Rule 2.3 of the Board's Rules which provides:

> **2.3** If a party receiving notice of an application does not file a response in the way required by these Rules, he or she may be deemed to have accepted all of the facts stated in the application, and the Board may cancel a hearing or consultation, if one is scheduled, and decide the case upon the material before it without further notice.

Decision Concerning the Certification Application

65. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act. This application was filed on July 10, 2009.

66. The Registrar has certified that the applicant has been found to be a trade union in an earlier proceeding under the Act and the solicitor for the applicant with knowledge of its affairs has declared the applicant is a council of trade unions that represents trade unions that according to established trade union practice pertain to the construction industry. Therefore, having regard to section 113 of the Act, the Registrar's certificate and the applicant's declaration, the Board finds that the applicant is a trade union within the meaning of section 1(1) and a council of trade unions within the meaning of section 126(1) of the Act. Having regard to the information provided by the applicant the Board is satisfied that Locals 183, 247, 493, 506, 527, 625, 837, 1036, 1059, 1081 and 1089 are constituent trade unions of that council.

67. The Board also finds that the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 153(1) of the Act on April 18, 1986, the designated employee bargaining agency is The Labourers' International Union of North America, Ontario Provincial District Council.

68. The responding party, although duly served with the application materials on July 14, 2009, according to the Certificate of Delivery filed by the applicant, failed to file its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and failed to provide the requisite information within the time stipulated by subsection 128.1(3) of the Act. For the reasons set out above in this decision, the Board is not prepared to exercise its discretion, assuming without finding it has discretion, to accept the late-filed Response of M3C.

69. The Board finds that this is an application for certification within the meaning of section 128 of the Act and is an application made pursuant to section 158(1) of the Act which provides that:

> An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry

> referred to in the definition of "sector" in section 126 shall be brought by either,
>
> (a) an employee bargaining agency; or
>
> (b) one or more affiliated bargaining agents of the employee bargaining agency,
>
> on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (2) or by voluntary recognition.

70. The Board further finds, pursuant to section 158(1) of the Act, that all construction labourers engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the employ of the responding party in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

71. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant, the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of constituent locals of the applicant at the time the application was filed. Therefore, pursuant to section 12(3) of the Act, those individuals are deemed to be members of the applicant on the date the application was filed. The applicant asserted there were 6 persons in the bargaining unit and filed membership evidence on behalf of all of those persons.

72. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. There is nothing raised in the application that would cause the Board to consider directing a representation vote.

73. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting, or indeed to date.

74. The Board is satisfied that it should certify the applicant.

75. Section 128.1(24) of the Act, which states as follows, provides for the issuance of more than one certificate if the applicant has the requisite support:

> If an election under this section is made in relation to an application for certification that relates to the industrial, commercial and institutional sector

> of the construction industry referred to in the definition of "sector" in section 126,
>
> ...
>
> (b) if the Board certifies the trade unions on whose behalf the application for certification was brought as the bargaining agent of the employees in the bargaining unit under clause (13)(a), it shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas;
>
> ...

Therefore, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council in respect of all construction labourers engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the employ of M3C Demolition Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

76. Further, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers engaged in the wrecking, demolition, dismantling or salvage of buildings and structures in the employ of M3C Demolition Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

77. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

3448-08-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Norlon Holdings Limited and/or Norlon Builders London Ltd. and/or Norlon Builders and/or Norlon Builders London Limited**, Responding Party

Certification – Construction Industry – Practice and Procedure – In this application for certification, the employer sought to add two names and a second worksite in its submissions following the Regional Certification Meeting – The employer had initially said it had no employees in the bargaining unit, that the individuals in question worked for a sub-contractor – The Board held that it is entirely acceptable for an employer to offer alternative positions in its response to an application for certification, but those positions must be provided within the timeframes set out in the Act – Any additions to an employer's list after the statutory

two-day limit are late-filed and may not be considered by the Board – In this case, the new information was seriously prejudicial to the applicant, and would not be accepted – Matter continues

BEFORE: *Mark J. Lewis*, Vice-Chair.

DECISION OF THE BOARD; September 23, 2009

1. As set out in the Board's previous decisions dated March 3 and April 9, 2009, this is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act") which the applicant (the "Labourers") has elected to have dealt with pursuant to section 128.1 of the Act.

2. Following the Regional Certification Meeting held for this matter on March 25, 2009, the only issues that remain in dispute concern the correct name of the responding party (which, for the purposes of this decision, will be referred to simply as "Norlon") and employee status. Accordingly, this matter was listed for hearing, to commence on July 21, 2009, by the Registrar.

3. With respect to employee status, the Labourers assert that there were two employees at work in the bargaining unit applied for on the date of application (February 22, 2009), being John Robertson and Andrew Smith. In response, Norlon's primary position is that there were no bargaining unit employees on the date of application and that Robertson and Smith, along with a third individual, Dave Weston, although at work on its Canadian Tire job site in Gravenhurst on the date of application, were all employed by its subcontractors. In the alternative, Norlon takes the position that, should the Board find that Robertson and Smith were its employees then there are three additional individuals, Weston and two further men, John McIntosh and Travis Bright (both of whom were allegedly at work at a job site in London, Ontario), who were similarly situated and who should, therefore, also be found to be employees in the bargaining unit.

4. The Labourers object to Norlon's attempt to *add* McIntosh and Bright to the list of persons whose employee status is in dispute by way of this alternative position and assert that the addition of these two individuals to the list is untimely under the provisions of the Act and/or the Board's Rules. At the request of the parties, and with the consent of the Board, it was agreed that this preliminary issue would be argued first and that the hearing concerning the "merits" of the issues in dispute would only take place, if it remained necessary, after the Board had issued a ruling with respect to the Labourers' preliminary objection. This decision, then, only concerns the Labourers' objection with respect to Norlon's alternative position involving McIntosh and Bright.

THE FACTS

5. The facts related to the McIntosh/Bright issue are not complex and are not in dispute.

6. On February 22, 2009, the Labourers filed their application with the Board seeking to be certified for a bargaining unit consisting of all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Board Area No. 18, save and except non-working foremen and persons above the rank of non-working foreman. In their application, which they delivered to Norlon the following day (February 23, 2009), the Labourers stated that there

was one job site where employees within the bargaining unit were working on February 22nd , the Gravenhurst Canadian Tire site, and that they believed there were three construction labourers at work on that day.

7. Norlon filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and purported to provide the Board with the requisite information in accordance with subsection 128.1(3) of the Act. Specifically, in its response, Norlon agreed with the Labourers' bargaining unit description and their assertion that the only active job site for the purposes of this application was the Gravenhurst site which the Labourers had identified. With respect to the number of employees that were at work in the bargaining unit on the date of application, Norlon stated, in Paragraph 5 of its Form A-74, Response, that there were none and thereafter, in Schedule "B" of its response provided the following positions:

> 6. Norlon's only employee on the job site on the Application Filing Date was its site superintendent, Doug Sears, who is excluded from the bargaining unit on the basis of s. 1(3)(b) of the *Labour Relations Act, 1995*.
>
> 7. There were three labourers on the job site on the Application Filing Date. However, they are not Norlon employees, but rather employees of subcontractors, as follows:
>
> | NAME | EMPLOYER |
> |---|---|
> | Dave Weston | DFP Contracting Inc. ("DFP") |
> | Johnny Robertson | Dukes of London ("Dukes") |
> | Andrew (unknown surname) | Dukes |
>
> 8. DFP and Dukes supply labourers to Norlon and other construction companies. They are both arms-length, third parties which are not related to or associated with Norlon, except to the extent that they supply labourers to Norlon on occasion.
>
> 9. Accordingly, Norlon submits that it had no employees performing bargaining unit work on the Application Filing Date.
>
> 10. In the alternative, should the Board make a determination that Doug Sears was performing bargaining unit work on the Application Filing Date, he was sole Norlon employee doing so.
>
> 11. In either alternative, Norlon submits that the Application should be dismissed in its entirety.

8. On March 3, 2009, the Board issued a decision concerning this matter in which it made the following findings and directions:

> 6. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection 128.1(3) of the Act, the Board is not able to determine the percentage of employees in the bargaining unit who were members of the applicant as of the date the application was

> filed. The Board will determine that, along with all other issues in dispute, following a Regional Certification Meeting.
>
> 7. The Board directs the applicant to deliver to the responding party and file with the Board its challenges (including any additions) to the Schedule A (list of employees) filed by the responding party no later than five (5) days from the date of this decision. The Board also directs the responding party to deliver to the applicant and file with the Board its position in reply to each of the applicant's challenges (including any additions the applicant proposed) within ten (10) days of the date of this decision. The parties are required to provide the reasons for each of their challenges following the Regional Certification Meeting in accordance with Information Bulletin No. 9: Status Disputes in Certification Applications in the Construction Industry.

9. On March 5, 2009, the Labourers provided their challenges and additions to the list of employees filed by Norlon as part of its response. They stated:

> The Union repeats and relies upon all of its material facts, particulars, arguments and submissions already filed with the Board in respect of this matter, and additionally states as follows:
>
> 1. Pursuant to the inquiries made by Union Representatives and/or Organizers, and based on their direct observations of the work being performed on the Responding Party's job site on the Date of Application, the Union submits that John Robertson and Andrew Smith were at work on the date of Application performing bargaining unit work for the majority of the day;
>
> 2. Moreover, it is the position of the Union that the Responding Party is the true, real and/or actual Employer for labour relations purposes of the above-noted individuals;
>
> 3. With respect to Mr. Doug Sears, the Union agrees with the position of the Responding Party that Mr. Sears is excluded from the bargaining unit by virtue of section 1(3)(b) of the *Labour Relations Act, 1995*.

10. On March 13, 2009, Norlon filed its response to the Labourers' additions in which it stated as follows:

> 1. John Robertson and Andrew Smith performed bargaining unit work for the majority of the day on the Gravenhurst Canadian Tire project on the Application Filing Date. However, they are not employees of Norlon, but rather employees of a subcontractor, a company conducting business under the name of Dukes of London ("Dukes").
>
> 2. Three other labourers spent the majority of the working day performing bargaining unit work on Norlon job sites on the Application Filing Date. They are employed by another subcontractor, conducting business under the name of DFP Contracting Inc. ("DFP"). They are:
>
> Dave Weston - Gravenhurst Canadian Tire site
> John McIntosh - London UWO site

Travis Bright - London UWO site

3. Norlon submits that in the event the Board were to find that Robertson and Smith are Norlon employees, then Weston, McIntosh and Bright are equally Norlon employees, as they also spent the majority of the day on the Application filing date performing labourers' work on a Norlon site.

4. Dukes and DFP:

   (a) invoice Norlon for employees' hours worked on Norlon sites;

   (b) pay their employees directly;

   (c) are perceived by employees to be the employer;

   (d) provide all required health and safety training to their employees;

   (e) provide Norlon with proof of WSIB coverage for their employees;

   (f) provide liability insurance;

   (g) had a number of ongoing jobs for other contractors at all relevant times;

   (h) are not economically dependent on Norlon.

5. Accordingly, it is Norlon's position that:

   (a) it had no employees other than Sears who performed bargaining unit work for the majority of the day on the Application Filing Date;

   (b) in the alternative, if employees of Dukes are considered to be Norlon employees, then employees of DFP are also Norlon employees. In that event, there were five individuals who performed bargaining unit work for the majority of the day on the Application Filing Date, as follows:

      (i) John Robertston

      (ii) Andrew Smith

      (iii) Dave Weston

      (iv) John McIntosh

      (v) Travis Bright

11. It is based on this course of events that Norlon seeks to be able to assert its alternative position with respect to McIntosh and Bright while the Labourers assert that Norlon should not be able to do so.

DECISION

Is Norlon seeking to rely on late filed information?

12. The starting point for the analysis of this issue is subsection 128.1(3) of the Act which states:

> **128.1** (3) Within two days (excluding Saturdays, Sundays and holidays) after receiving notice under subsection (2), the employer shall provide the Board with,
>
> (a) the names of the employees in the bargaining unit proposed in the application, as of the date the application is filed; and
>
> (b) if the employer gives the Board a written description of the bargaining unit that the employer proposes, in accordance with subsection 7(14), the names of the employees in that proposed bargaining unit, as of the date the application is filed.

13. Norlon takes the position that it complied, in all respects, with the provisions of subsection 128.1(3)(a) of the Act in relation to McIntosh and Bright. It asserts that it filed its response to this application in a timely manner and therein advised that it had no bargaining unit employees on the date of application, a position that it continues to maintain, and that it was, therefore, not obligated, under the requirements of subsection 128.1(3)(a) of the Act, to file a list of employees naming either McIntosh or Bright, within the two day statutory time limit. It claims that it only became aware that the Labourers were taking the position that it was in fact the true employer of persons that it views as employees of its subcontractors after reviewing the Labourers' March 5th challenges and additions. Accordingly, Norlon asserts that its March 13th response to the Labourers' additions, in which it raised its alternative position concerning McIntosh and Bright, was proper and timely in all respects as this represented its first opportunity to respond to the *true employer* question which the Labourers had put in issue on March 5th. With respect, I disagree.

14. In the context of this case it was not disputed, and I accept, that, in complying with its obligations under subsection 128.1(a), a responding party may set out alternative positions. This, for example, is precisely what Norlon did in its initial response with respect to its Gravenhurst site superintendent, Doug Sears, in that it took the primary position that there were no employees at work in the bargaining unit on February 22nd, as Sears is excluded by virtue of section 1(3)(b) of the Act, and thereafter took the alternative position that if Sears is not so excluded then there was one employee at work in the bargaining unit on the application date. Accordingly, had Norlon set out its alternative position concerning the UWO job site and McIntosh's and Bright's work there on the application date in its initial response I would have no hesitation in finding that it had complied with the requirements of subsection 128.1(a). As such Norlon would have been perfectly entitled to pursue such a position, in the alternative to its primary position that neither of these two men were its employees, at the hearing concerning this matter. Obviously, however, that is not what Norlon did.

15. In my view the language of subsection 128.1(3)(a) is extremely clear with respect to what responding parties are required to provide, namely they must set out the names of the employees in the bargaining unit proposed in the application as of the date the application is filed. This clarity of language underscores the obvious purpose of this statutory requirement. Specifically, the Act has been drafted so as to ensure that, in normal circumstances, an applicant union and the Board are aware of the individuals that the responding employer asserts were its bargaining unit employees, within two day of the date that the application is delivered to the employer.

16. There are any number of circumstances which may make it difficult for responding parties to comply with this statutory requirement. For example it may not always be easy for a responding party to determine whether a particular individual: is, or is not, its employee; was, or was not, at work on the date of application; and did, or did not, perform bargaining unit work for the majority of the time on the date of application. For this reason (at least in part), and as noted above, it is acceptable for responding parties to take alternative positions concerning employee status. However, where one of the alternative positions that a responding party wishes to take is that an individual is an employee in the bargaining unit on the date of application, then, in order to fully comply with section 128.1(3), the employer must advise the union and the Board of the individual's name (presumably along with its alternative position) within the two day statutory time period. If it only provides such information at a later date then it has provided the Board with *late filed* information and runs the risk that the Board may not consider it. Therefore in the circumstances of this particular application, Norlon is then seeking to have the Board consider late filed information with respect to its alternative position that McIntosh and Bright are its employees and were at work in the bargaining unit on the date of application, as it failed to list them in its response (as it did with Robertson, Smith, Weston and Sears) in relation to its alternative position.

17. As both parties agree, this was one of the first applications which was subject to the Board's new procedures concerning status disputes in section 128.1 applications. These new procedures provide for the filing of positions concerning employee status by the parties subsequent to the filing of the application and response but prior to the Regional Certification Meeting. However, these new procedures do not and cannot override the requirements of the Act. Further, a close reading of the written materials concerning these new procedures, which Norlon relies on with respect to its attempt to add McIntosh and Bright to the list, actual confirms that its information concerning McIntosh and Bright was filed late, as opposed to establishing that it was timely as Norlon attempted to argue.

18. In this respect, in the above quoted paragraph 7 of its March 3rd decision, the Board directed the Labourers to file their challenges and additions to the list of employees filed by Norlon and directed Norlon to thereafter file its positions in response to each of the additions and challenges which the Labourers might provide. What the Board very consciously did not do in that decision is to provide Norlon with the opportunity to add names to the list of employees which it had provided with its response.

19. Further, the Board's *new* Information Bulletin No. 9, Status Disputes in Certification Applications in the Construction Industry, clearly explains the new procedures. It states:

> Where there is a dispute about the employees listed (or not listed) on Schedule A, the union is usually directed to deliver to the employer and file with the Board its challenges (including any additions) to Schedule A no

> later than five (5) days from the date of the Board's decision directing a Regional Certification Meeting. The employer is to deliver to the union and file with the Board its position in reply to each of the union's challenges (including any proposed additions) within ten (10) days of that decision. *Once the union has responded to Schedule A, neither party will be permitted to add to, or delete from, the list without agreement of the parties or leave of the Board.* A Regional Certification Meeting will follow. [Emphasis added]

20. Norlon relies on the fact that this new Information Bulletin contemplates employees being added to the Schedule A subsequent to the Union's response to the employer's initial list, in certain circumstances. This, however, cannot mean, as Norlon argues, that its alternative position concerning McIntosh and Bright was made in a timely manner. If that were so, a responding party would not need the agreement of the applicant or the consent of the Board to add (or at least potential add) persons to the list of employees subsequent to the Union's response to the Schedule A, as Information Bulletin No. 9 states. Rather, if such actions by responding parties were timely under the Board's new procedures, a responding party would be entitled to make such additions as of right.

Should the Board exercise its discretion to consider the late filed information?

21. Norlon argues that even if it alternative position concerning McIntosh and Bright does constitute an attempt to add employees to the Schedule A, List of Employees, beyond the two day time period provided by the Act (as I have now in fact found), the Board still has the discretion to consider such late filed information and that it should exercise that discretion in the circumstances of this case. In turn, the Labourers argue that the Board has no such discretion to consider late filed information and that any such discretion which the Board may have should not be exercised here, in any event. For the reasons set out below, I find that I would not exercise any discretion which I may have to consider the late filed information concerning McIntosh and Bright in these circumstances and it is therefore not necessary for me to determine, definitively, whether the Board actually has any such discretion.

22. Both parties agree that the leading case with respect to the potential exercise of the Board's discretion with respect to late filed information under section 128.1(3) is *Reids Uptown Homes et al.*, [2007] OLRB Rep. May/June 633 (May 16, 2007), in which the Board identified (both in a general way and in a more specific manner) a number of factors to be considered in such circumstances. Although the Board stated in that decision that the factors which it had identified were not supposed to be an exhaustive and fixed list of factors to be considered in every case, virtually all (if not in fact every single one) of the Board's decisions which have dealt with this issue following *Reids, supra,* have considered the factors set out therein.

23. In *Reids, supra,* the Board identifies three general categories of factors to be considered, the first of which is: the circumstances surrounding the filing. With respect to this general category, the Board then states the following concerning more detailed factors, all relating to the circumstances surrounding the filing of the application, which may be relevant:

> *Circumstances surrounding the failure to file*
>
> 28. Every case must be decided on its own merits. However, in the abstract it seems to me that the following factors might be relevant:

- the reasons for the failure to file a response in a timely fashion (the facts of *Maystar General Contractors Inc.* and *Kralic Electrical Services Inc.* are a good example of this);

- whether the union had actual notice of the employer's position;

- the conduct of the union, i.e. did it contribute to the employer's delay, did it misrepresent (innocently or deliberately) an important matter to the Board;

- whether there is any history of dealing between the employer and the applicant union that is relevant to the issue of the employer's lateness in filing the application;

- whether the employer acted quickly on learning of the true situation.

The overriding consideration is, in my view, whether the employer attempted to file a timely response, or would have filed a timely response but was unable to do so because of reasons that are beyond its control, or the result of an innocent error that causes no prejudice to any other party or the Board. Indeed, this has been the focus of the Board's concern in the cases that it has dealt with since the decision in Maystar General Contractors, supra, was released.

24. In this specific case it is agreed that the Labourers had no actual notice of Norlon's alternate position concerning McIntosh and Bright prior to the March 13th submissions and that there were no dealings between these parties prior to the filing of this application. These two factors, then, do not assist Norlon in its position that the Board should exercise its discretion in these circumstances.

25. Norlon claims that the Labourers contributed to the delay in this case in that they did not state in their initial application that they took the position that Norlon was the true employer of the individuals who were nominally employed by subcontractors. I do not find this to be the case. If it is assumed that the Labourers were aware that the men in question were nominally employed by subcontractors when they initially filed their application then it is true that they could have filed more detailed particulars concerning the three individuals who were at work on the Gravenhurst job site, at that time. However, I still do not believe that the Labourers' position, as set out in the application, was in anyway unclear and can be found to have materially contributed to any delay on the part of Norlon. In their application the Labourers' listed one job site and claimed there were three bargaining unit employees at work on that site on the date of application. Based on the response it filed, it is readily apparent that Norlon was aware exactly which three individuals the Labourers' application related to given that it knew there were in fact three (and apparently only three) construction labourers, below the rank of non-working foreman, at work, on the job site identified by the Union, on the date of application. In fact Norlon named these three men as part of its response. In these circumstances the most (if not the only) logical inference is that the Labourers were taking the position that Norlon was the employer of these three men and as such Norlon cannot reasonably claim that it was surprised when the Labourers maintained this position when they filed their additions to the list of employees on March 5th.

26. With respect to its reasons for the late filing of the information concerning McIntosh and Bright, Norlon claims that it simply did not know that the Labourers were taking the position that it was the true employer of its subcontractors' employees and that when it found out that this was in fact the case it acted promptly to provide the required information. As set out above, I believe that Norlon could have and/or should have known what the Labourers' position concerning the three men on the Bracebridge job site was prior to March 5th. Further, based on Norlon's response and further submissions, I am not convinced that its supposed lack of knowledge constitutes a sufficient reason for its late filing, in these circumstances, in any event.

27. Here, Norlon filed a timely response in which it identified, at paragraph 3, the Bracebridge job site as the only site *in the bargaining unit proposed by the applicant at which the work was being performed on the application filing date.* It also specifically identified the three individuals (below the rank of non-working foreman) that were at work, doing labourer's work, on the Bracebridge site that day. Conversely, Norlon made no reference to either the UWO job site or to McIntosh and Bright in its response.

28. In its submissions to the Board dated April 3, 2009, Norlon explains why it responded in this manner as follows:

> 16. The reasons for the delay: Upon receipt of the Application, Norlon's controller, Ed Farrell, immediately contacted each of the Company's site superintendents to determine whether they had crews working on the Application Filing Date. With the exception of Doug Sears in Gravenhurst, none of them had crews working. It was only upon receiving the Union's submissions of March 5th that Mr. Farrell contacted all of Norlon's subcontractors to determine if they had any crews working on the Application Filing Date. At that time, he was advised by Bruce Monck of DFP that Mr. Monck had a crew performing bargaining unit work for the majority of the day at the UWO site in London. Prior to receipt of the Union's March 5th submissions, Norlon did not consider employees of subcontractors to be at issue in this proceeding.

29. These submissions, however, would appear to cloud rather than explain Norlon's reasons for failing to mention the UWO site and McIntosh and Bright until March 13th. By its own admission Norlon contacted its site superintendents immediately after receiving the application for certification in order to find out who was at work on its various job sites on the date of application. Mr. Sears was apparently able to respond to these enquiries by advising that that there was a "crew" working on his (Bracebridge) site on February 22, 2009, and either he, or someone else, was able to get the names of these three men along with the names of the subcontractors Norlon claims they were working for. All of this information, including the fact that, Norlon claimed that one of these men, Dave Weston, was actually employed by a subcontractor named DFP on the relevant date, was set out in its response. Given this, it is then completely unclear to the Board why Norlon's site superintendent for the UWO job site could not, and/or should not, have been aware that there was a crew, consisting of McIntosh and Bright who it also claims were employed by DFP, at work, performing labourer's work, on the date of application, on the UWO site. Accordingly, there is simply no reason for Norlon not to have listed, and taken positions concerning, the UWO site and the DFP labourers that were at work there on the date of application in its response given that that is exactly what it did with respect to Robertson, Smith and, in particular, Weston and the Bracebridge site.

30. The second broad factor to be considered with respect to the exercise of the Board's discretion is that of the prejudice to the union which will arise if the late filed information is considered. With respect to this, the Board, in *Reids, supra,* stated:

> *Prejudice*
>
> 29. The issue of prejudice must be seen in the context of the two-day time limit. It will, in fact, be essentially the same level of prejudice in every case. It is not possible to point to the kind of specific lost opportunity that the Board identified in cases such as *Iori Plaster & Drywall Contractors Inc.* [1997] OLRD No. 4411 and *New Generation Group*, [1998] OLRB Rep. Nov./Dec. 990 when a representation vote was required in each case. There is, however, a real prejudice that is not dispelled, and will be the same almost every time.
>
> 30. The Board's experience in construction industry applications is that a significant minority of employers do not file a response, for any number of reasons. Thus a trade union is unlikely to be surprised by the absence of a response; it is a common occurrence. Disputes about whether an employee is properly in the bargaining unit usually centre on whether the person was at work on the application date and what that person was doing. The information about who was working on which site and what work each employee was doing is, at the best of times, productive of a surprising amount of uncertain evidence when the matters are heard. Thus it is important for all parties to know what the position of the other parties is very quickly.
>
> 31. Even where a union has information about a particular job site, the significance of specific individuals and the specific work they were doing is not necessarily apparent until an issue is raised by an employer. The possibility of lost or ignored evidence arises even over a short period of time. In addition, and particularly in circumstances where a union is faced with a suggestion that there were more employees than they were aware of or believed to be at work, or the existence of an alleged job site of which they were unaware, the ability to ascertain accurate information about the factual basis for the employer's position diminishes by the hour. A delay of even one or two days increases this difficulty. The ease with which a person working on a construction site will be able to determine who he or she was working with and what tasks were accomplished on an otherwise unremarkable working day falls off with surprising rapidity.
>
> 32. The prejudice then is real, even in the context of the very short time limits that prevail in certification applications. What is perhaps even more significant is that this prejudice will be the same in every case. Any decision to consider late-filed information (except in cases such as *Maystar General Contracting Inc., supra,* where the union in fact had the information) will always involve prejudice, and the same kind of prejudice, to the union. That suggests an even greater focus on the reasons for the employer's failure to provide the information to the Board in a timely fashion.

31. In this case there was a delay of twelve Board days, or sixteen calendar days, from the February 25th response date until March 13th when the Labourers actually became aware of Norlon's

alternative position concerning McIntosh and Bright. In the context of employee status disputes in the construction industry this is an exceedingly long period of time and there can be no question that the Labourers will be subject to prejudice if the Board were to allow Norlon to pursue its alternative position concerning these two men. This prejudice might be lessened somewhat if Norlon's alternate claim involved the Bracebridge job site, as the Labourers were clearly aware of, and were monitoring, that site on the date of application. The same might well be true if the only question that Norlon's alternate position gave rise to is that of who is the true employer of these two men, as evidence is concerning this question is not as susceptible to disintegration over time as evidence relating to what work (if any) a particular individual may have been doing on the date of application is. However, the McIntosh and Bright issue concerns a job site which the Union was apparently unaware of and which is more than a hundred miles from the Bracebridge site (which as noted above is the only site Norlon listed in its response). Further, as is made clear in paragraph 18 of their submissions to the Board dated March 31, 2009, the Labourers dispute that McIntosh and Bright were at work and/or were performing bargaining unit work on the date of application. As the Board has repeatedly noted a delay of even a few days in being made aware of an employer's position can prejudice a union's ability to properly investigate what work, if any, an individual may have been doing on the date of application. This is particularly the case where the employer's position concerns a job site that the Union was unaware of. Accordingly, I find that in this case the Labourers would be subject to very serious prejudice should the Board consider the late filed information that Norlon is seeking to rely on.

32. The final general factor considered by the Board in *Reids, supra,* is that of the possible effect of considering the late filed information. With respect to this factor the Board stated:

> *The possible effect of considering the information*
>
> 33. One matter that is, in my view, not a significant factor in the exercise of that discretion is the possibility that considering the late information might have an effect on the result in the case. The information that is the focus of subsection 128.1(3) is limited to two very important facts: the number and identity of persons in the bargaining unit and the bargaining unit description. This may be accomplished by providing a list of names with no other information. The Board will never be in a position to assess the likely strength of the employer's position; it will simply be aware that there is a dispute that will require litigation to resolve.
>
> 34. The fact that the information might produce a different result to the case is not a reason in and of itself to exercise the Board's discretion. Presumably that possibility would always be the reason why a responding party would wish to pursue a late-filed response, and that is what the legislature must have contemplated when setting the 2-day time limit. If the fact that the result might be affected by the "late filed information" is sufficient to cause the Board to exercise its discretion to consider it as if it had been filed in a timely fashion, there would be no point in imposing a time limit at all, and particularly one enshrined in the Act rather than left to the Board.

33. Here, it is important to note that this is not a case such as those considered by the Board in *Easton's Group of Hotels Inc.*, [2006] OLRB Rep. July/Aug. 508 (August 9, 2006) and the decisions of the Board thereafter which have followed the decision in *Eason's, supra*, in which there is a risk

that Norlon might become certified based on the actions of *strangers*. Should this matter proceed without the Board considering the late filed information, Norlon would still be perfectly entitled to pursue its primary position that it had no bargaining unit employees. As such the Labourers will only be successful in their application for certification if they are able to prove, on the balance of probabilities, that Norlon was the true employer of John Robertson and Andrew Smith and that there were, then, at least two employees of Norlon at work in the bargaining unit on February 22nd.

34. In these circumstances, the only real significance of not considering the late filed information is that, should it find that Robertson and Smith were Norlon employees, the Board will not consider whether McIntosh and Bright were also Norlon employees who were at work in the bargaining unit on the date of application. Such an outcome is identical to the situation which arises whenever an employer initially leave an individual off its Schedule A list and thereafter attempts to add him/her to the employee list subsequent to the two day statutory time limit. Such an occurrence may be unfortunate but it is by no means uncommon and, as the Board noted in *Reids, supra,* cannot, standing alone, constitute the basis for the exercise of the Board's discretion as if it did the Board would always consider such late filed information. Therefore, not considering Norlon's alternate position concerning McIntyre and Bright will not have a significant impact on the outcome of these proceedings.

Conclusion

35. For the reasons set out above, Norlon will not be permitted to pursue the alternate position that McIntyre and Bright are also employees in the bargaining unit who were at work on the date of application should it be found that Norlon is the true employer of Robertson and Smith for the purposes of this application. I would note that my conclusions may very well have been different with respect to Mr. Weston. In his case, the Union has never disputed that Weston was the third of the three *Norlon employees* that it (initially at least) claimed were at work on the Bracebridge job site, in its application. Further, Weston was specifically named as being at work on this job site on February 22nd, by Norlon in its response. While it is true that Norlon did not specifically take the alternative position in its response that if Robertson and Smith were found to be its employees then Weston should be so found as well, given the clear statements of Norlon (in the response) concerning all three of these men and their work on the Bracebridge site, the prejudice to the Union in allowing Norlon to pursue such a position would be negligible, if any. However, in view of my decision herein concerning McIntosh and Bright, Weston's status is not numerically significant to the outcome of this matter and, therefore, need not be decided.

36. It is unclear if this decision concerning the preliminary issue will allow these parties to resolve their remaining differences or whether it will still be necessary for this matter to proceed to hearing on the merits. If the latter is the case, then the parties are to contact the Registrar to arrange for the setting of further hearing dates.

37. I am not seized of this matter.

0829-08-G International Union of Elevator Constructors, Local 96, Applicant v. **Otis Canada Inc.**, Responding Party

Construction Industry Grievance – The union filed grievances on behalf of two workers who were found to have violated the employer's safety rules, the first for failing to wear fall protection, the second for not wearing a hard hat while working in the elevator pit – The workers were re-roping an elevator, and were required to work at times one above the other – The Board found that the first grievor was working on a moving elevator, and the employer's Safety Handbook provided that lanyards should not be connected to moving elevators; the first grievor was absolved of his alleged violation – For the second grievor, while the Board found he had not broken one of the employer's "cardinal rules" of safety, his failure to don a hard hat was an egregious enough violation of an important safety rule to warrant discipline – The Board found just cause for discipline to the second grievor and declared that the two-day suspension was a reasonable penalty – Grievance allowed in part

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *John Tomlinson* and *Alan Haward.*

APPEARANCES: *David Jewitt, Ron McNevin, Steve Sampson, Joe Atherford* and *Scott Rondeau* for the applicant; *M. Patrick Moran, Bob Parish, Steve Othen, Bob Miller, Phil Paturzo* and *Andy Reistetter* for the responding party.

DECISION OF THE BOARD; September 17, 2009

1. This is a referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as am., (the "Act") arising from the imposition of two day suspensions on Joe Atherford and Scott Rondeau, two employees of the responding party ("Otis") covered by the collective agreement by which the applicant ("Local 96) and Otis are bound.

2. Otis issued two day suspensions to Messrs. Atherford and Rondeau because it claimed that they had violated the safety rules established by Otis when they were working on the re-roping of an elevator at the Delta Hotel in Ottawa on April 8, 2008. Otis asserts Mr. Atherford had failed to use fall protection when he was required to do so and Mr. Rondeau had worked in the hoistway below Mr. Atherford. In addition, Otis found Mr. Rondeau was not wearing a hard hat while working below Mr. Atherford in the hoistway.

3. The parties agreed the re-roping job at the Delta Hotel was maintenance and not construction work.

4. Otis has promulgated a number of what it characterizes as "cardinal rules" of safety that all employees must comply with. Those "cardinal rules" have been established by Otis in order to emphasize the importance of safe work practices in an industry where there is a very real risk of serious injury or death if an employee fails to adopt and consistently apply those safe practices, and in particular those cardinal rules, at all times. In addition to the "cardinal rules" established by Otis, there are a number of other safety rules and procedures established by Otis as set out in the Otis Employee Safety Handbook (the "Safety Handbook"). An employee who contravenes any of the Otis safety rules and procedures is subject to discipline ranging from a warning to discharge while an employee who contravenes a cardinal rule is, according to the cardinal rule policy mandated by Otis, subject to not less than a two day suspension and may be faced with more severe discipline, up to and including discharge.

5. Local 96 does not disagree with the importance of its members working safely at all times. It accepts its members must carry out their duties in accordance with the safety procedures and practices established by Otis. It does not challenge the emphasis and priority Otis gives to safety in the workplace. Rather, in this case, it claims that neither Mr. Atherford nor Mr. Rondeau contravened an Otis cardinal rule of safety. It also acknowledges that Mr. Rondeau did indeed fail to wear a hard hat while he was working in the hoistway during the re-roping work, but submits the two day suspension issued by Otis was too severe in the circumstances.

6. There are eight cardinal rules established by Otis in respect of elevator work. The two cardinal rules relied on by Otis as justifying the two day suspensions it imposed on Messrs. Atherford and Rondeau are:

a) Always use fall protection when a fall hazard exists;

b) Never work above or below others when working in the hoistway.

7. On the morning of April 8, 2008 Mr. Atherford and Mr. Rondeau were assigned to carry out re-roping of an elevator at the Delta Hotel in Ottawa. Two employees must work together to do a re-roping job. The re-roping process requires the elevator counterweight to be positioned on supports in the elevator pit to eliminate tension on the elevator cables. Placement of the counterweight on the supports requires one person in the pit to monitor the placement and one person on the top of the elevator car to control the movement of the counterweight (and the car).

8. The Board received the parties' evidence and submissions during three days of hearing and is satisfied that neither Mr. Atherford nor Mr. Rondeau violated the cardinal rules as claimed by Otis.

9. Section 15.0 of the Otis Employee Safety Handbook deals with the use of fall protection. While fall protection must be used when there is a fall hazard, in the section headed "Fall Protection on a Moving Car", the handbook states:

> In general lanyards should not be connected to a moving elevator.

As Mr. Atherford was moving the elevator in order to have the counterweight positioned on the supports when he was observed not using fall protection, he was in fact working in accordance with the Safety Handbook and not contrary to the cardinal rule.

10. In those circumstances, there was no justification for the two day suspension imposed on Mr. Atherford.

11. Mr. Rondeau was required to work in the pit to place the counterweight while Mr. Atherford was moving the elevator. It was clear to us on the evidence the focus of the safety problem discovered by Otis on April 8th in respect of Mr. Rondeau was his failure to wear head protection in those circumstances. The obligation to wear a hard hat is not a cardinal rule, but it is a safety rule found in the Safety Handbook.

12. Section 14.4 of the Safety Handbook is headed "Head Protection". The relevant portion of that section provides:

> Hard hats must be worn whenever an overhead hazard exists in accordance with the following:
>
> Hard hats must be worn:
>
> - at all times on construction
> - at all times in the hoistway during modernization,
> - at all times in the hoistway during two person repairs,
> - at all times in the hoistway during maintenance when someone is working above in the hoistway, above in the hoistway adjacent, or above in the machine room, when working in a multiple elevator hoistway and adjacent elevators are in operation.
> - when entering walk-in pits with multiple hoistways.

We would observe that section 14.4 appears to contemplate, in some circumstances an employee may be working in a hoistway below another person working in that hoistway.

13. When Mr. Rondeau was monitoring the placement of the counterweight, he was required by section 14.4 of the Safety Handbook to wear a hard hat while in the elevator pit to carry out that work. Since we are satisfied Mr. Rondeau had contravened the head protection section of the Safety Handbook there was just cause for Otis to impose discipline.

14. Section 133(9) of the Act provides:

> If the Board accepts the referral, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48 (10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

Since this referral proceeded before the Board under section 133, section 48(17) of the Act applies to this proceeding by virtue of section 133(9). Section 48(17) of the Act provides:

> Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances.

The parties' collective agreement does not contain a specific penalty for a violation of cardinal rules or other rules established by Otis. Therefore, the Board has the discretion under the Act to substitute another disciplinary penalty for the discipline imposed by Otis where a violation of any rule established by Otis has been demonstrated.

15. The issue remaining for consideration is whether the Board, in all these circumstances, particularly in view of our finding that Mr. Rondeau had not violated an Otis cardinal safety rule, should substitute another penalty for the two day suspension received by Mr. Rondeau for his admitted failure to wear a hard hat when he was in the elevator pit working below Mr. Atherford.

16. In our view, a two day suspension for the failure to wear a hard hat in a hoistway while working below another employee is certainly a reasonable, if not completely appropriate, disciplinary response to what we consider an egregious violation of what we believe is an important safety rule, despite it not being classified by Otis as a cardinal rule. There can be no justification for failing to wear a hard hat when entering a hoistway knowing that work is taking place overhead. There is, in our opinion, a very real risk of head injury when repair or maintenance work is taking place above an individual. A tool slipping off a belt, or an object like a nut, bolt or screw coming loose or falling out of a pocket or pouch and dropping thirty or forty or more meters below (Mr. Atherford had the elevator car at the 19th floor of the Delta Hotel when Mr. Rondeau was in the elevator pit) might well cause a concussion, skull fracture or more severe injury to the person struck by the falling object. There are good reasons for the requirement to wear head protection in the circumstances described in section 14.4 of the safety handbook. We are not prepared on these facts to exercise the discretion we have under section 48(17) of the Act to ameliorate the disciplinary penalty imposed by Otis on Mr. Rondeau. It is important in our view to emphasize to both Mr. Rondeau and other employees in the elevator industry that contravening a safety rule relating to elevator repair and maintenance work can lead to serious injury or death and as a consequence ought to attract a significant disciplinary response.

17. In the result, the grievance filed by Local 96 in respect of Mr. Rondeau is dismissed. The grievance filed by Local 96 in respect of Mr. Atherford is allowed and the Board declares Otis did not have just cause to impose a two day suspension on Mr. Atherford.

18. The Board directs Otis to revoke the two day suspension imposed on Mr. Atherford and to remove that suspension from his record.

19. This panel of the Board remains seized with determining what other remedial orders, if any, are warranted if the parties are unable to agree.

0956-08-R Plumbers Residential Council of Ontario, Applicant v. **Plumbtech Plumbing Inc.**, Responding Party

Certification – Construction Industry – Sector Determination – The Plumbers applied to certify employees of the employer in all sectors excluding ICI – The original application listed a jobsite that involved the construction of cottages at a resort – The union had originally claimed the work as "residential" but altered its position at the regional certification meeting, asserting that the project was ICI (the union was not estopped from changing its position by an earlier Board decision) – The Board considered the financing of the project (the developer had "owners" invest in time shares, rather than providing its own capital); the materials used in the construction of the cottages (typically, to *residential* specifications); the role that the developer proposed to retain once the project was complete (akin to a property management company); and the end use (cottage "owners" were at liberty to rent, sell, bequeath, etc. their share of each cottage) – Notwithstanding that the owners may never inhabit the cottages themselves, the Board found there were no significant commercial aspects to the undertaking, so the construction fell into the residential sector – Matter continues

BEFORE: *Diane L. Gee*, Alternate Chair.

APPEARANCES: *D. Wray, Rob Kramer, John Bonwick* and *John Bernier* for the applicant; *Daniel Leone, Marc Benoit, Susan Benoit* and *Louise Grabelle* for the responding party.

DECISION OF THE BOARD: September 10, 2009

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act. This application was filed on June 20, 2008.

2. The application seeks certification for a bargaining unit of all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Plumbtech Plumbing Inc. ("Plumbtech") in the County of Simcoe and the District Municipality of Muskoka, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. By way of decision dated June 30, 2009, the Board found that the bargaining unit applied for constitutes a unit of employees of the responding party appropriate for collective bargaining.

3. On the date of application, Plumbtech employed three plumbers, pipefitters and/or apprentices at a Muskokan Resort Club Inc. project (the "MRC project"). The Plumbers Residential Council of Ontario (the "Union") listed this jobsite as one of the jobsites to which its Application for Certification related and included the three individuals employed at this site in its estimate of the number of employees employed in the bargaining unit on the date of application. At the Regional Certification Meeting, the Union took the position that the MRC project did not fall within the scope of the bargaining unit on the basis that it fell within the industrial, commercial and institutional ("ICI") sector of the construction industry. Plumbtech argued that the Union was estopped from altering its position as to whether the MRC project was within the scope of the bargaining unit. The Board, differently constituted, dismissed Plumbtech's estoppel argument by way of decision dated August 19, 2008.

4. The Board convened a hearing on July 23, 2009 to deal with the issue as to whether the MRC project falls within the ICI or residential sector of the construction industry. While the parties were unable to reach an agreed statement of fact, they acknowledged that there are few, if any, facts in dispute. The Board was provided with photographs of the MRC project; a copy of the Building Permit; a page from the Building Permit Application entitled "Schedule 1: Designer Information"; a document describing ABS pipe; the definition of "home" from the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31; Table 8.2.1.3.A Residential Occupancy from the Ontario Building Code; and excerpts from the information package produced by The Muskokan Resort Club as part of its marketing materials. The sole witness called to testify was the owner/president of Plumbtech, Marc Benoit, who testified in a very forthright and honest manner concerning the work characteristics of the project. The Union did not call any *viva voce* evidence.

5. No legal documents, such as the agreement of purchase and sale between MRC and a purchaser of one of the cottages in issue or the legal document pursuant to which MRC would continue to act as a property manager of the MRC site were provided to the Board. The only evidence placed before the Board concerning the end use of the project was the information contained in the

excerpts from the information package produced by The Muskokan Resort Club as part of its marketing materials and facts orally provided to the Board by the parties.

6. The Muskokan Resort Club information package contains a page that states "each owner will be a member of The Registry Collection". It is stated that such membership allows the owner "to exchange time at The Muskokan for time at some of the most desirable locations around the globe." While there are two further columns of "information" about participation in The Registry Collection the information provided is not very detailed. It sounds, from the information package, as if The Registry Collection is a completely separate entity from MRC, however, it is not explained how The Registry Collection and MRC, or the owners of cottages at MRC, coordinate/cooperate to allow access to MRC cottages by other Registry Collection members. Given that the MRC project is not yet completed, the extent to which owners of the cottages will exchange their points to stay at other Registry Collection properties and/or allow access to their cottages to other Registry Collection members is not known.

7. The foregoing overview of the evidence presented to the Board in this matter is not intended to be a criticism. In fact, the parties are to be commended for presenting the case in a very efficient manner. The foregoing overview is simply to highlight the scope of the information available to the Board in this matter and the facts on which this particular case was determined.

8. In the case of *Sault Ste. Marie*, [2002] OLRB Rep. Sept./Oct. 870 (October 3, 2002), the Board stated that no single test can be applied to determine sector. The Board indicated that it was necessary to look at all of the relevant factors including: work characteristics; end use; and bargaining patterns. In the present case, Plumbtech argued that work characteristics (principally the materials used) and end use suggest that the project falls within the residential sector of the construction industry. The Union argued that work characteristics were of no assistance and that end use suggested that the project falls within the ICI sector. Neither party suggested that there were any relevant bargaining patterns.

9. Based on the evidence provided to the Board, in respect of which there was no dispute, the facts are as follows.

10. Plumbtech was working at the MRC project as a subcontractor to Tech Home, a residential builder.

11. The MRC project is located on property that was formerly a resort known as "Belmont House" that included a collection of two and three bedroom cottages. The marketing materials describing the MRC project indicate as follows:

> In 2000, the resort was acquired by Resorts Muskoka. Continuing the history of the Pinelands, the property is being redeveloped into The Muskokan Resort Club on Lake Joseph and will be owned entirely by fractional owners. The Muskokan retains the tradition of exclusive vacation living started by the Fairhalls more than 100 years ago.

12. MRC is structured so as to permit individuals to purchase fractional ownership of a specific MRC cottage in five week units. There are a total of 10 five week units for each cottage totalling 50 weeks. The remaining two weeks of each year are held back to be used for maintenance

purposes. If someone purchased all 10 five week units for a specific cottage they would have exclusive ownership of the cottage. For ease of reference, in the balance of this decision, I will refer to the owner of one or more five week units in a specific cottage as the "unit owner".

13. MRC offers full equity membership in Muskokan Resort Club Inc. Each unit owner has one share in MRC for each five week unit that they purchase. The unit owners, as members of MRC, are indirectly equity owners. The fee simple title to the entire site is held by MRC. Essentially, each unit owner has 1/10 share ownership of a specific cottage for each five week unit purchased as well as 1/350 share for each five week unit purchased in the rest of the resort.

14. There are no restrictions on what the unit owners can do with their share of the cottage. Unit owners can sell their share of a cottage at any time at any price; bequeath their share to their heirs; rent it out to friends or strangers; allow friends to use it; and invite guests to share it. Any profit earned by the unit owner by renting or selling the unit belongs to the unit owner. There is no obligation to rent the property. In addition, each five week unit is worth a set number of points in The Registry Collection. As such, unit owners can trade their points via The Registry Collection and go stay at another property registered with The Registry Collection anywhere in the world.

15. The MRC property includes a number of amenities that are available to the owners. Such services include:

- Boat House
- Fitness Facility
- Basketball Court
- Swimming Pool
- Children's Play Structure
- The offering of Spa Services; Daily Housekeeping and Babysitting for a fee. Specific prior arrangements for these services must be made. Requests for these services are handled by the "Inn Keeper" who will find a suitable service provider and make arrangements for that service provider to come in and provide the requested services.

16. Vehicles are not taken onto the resort property. Rather, cars are parked in a lot at the entrance to the resort and a fleet of golf carts are available for transport to the cottages.

17. Weekly cleaning of the cottages is mandatory. The cost of this weekly cleaning is covered by the yearly maintenance fee that unit owners are required to pay. The yearly maintenance fee includes property taxes. Maintenance on the units is paid for out of the yearly maintenance fee as is the cost of taking care of the grounds. The units cannot be mortgaged and liens cannot be registered against the property.

18. Unit ownership entitles the owner to golf at a local golf club until 2011 by paying only the cart fee. In addition, unit owners are "Veranda Members" at a local golf club. Veranda Members enjoy dining privileges.

19. To date there is no restaurant on the site and there is no room service provided.

20. The cottages have three, four or five bedrooms and are fully self sufficient units each with a kitchen, bathrooms, a dining room and great room. All have the attributes of a fully functioning home. They come fully furnished and stocked with daily necessities such as dishes. The cost of the contents of the cottage is included in the price of a unit. Unit owners are not permitted to change the décor and are responsible for the cost of any damage they cause to the furnishings or the cottage itself. Unit owners are charged for anything missing from the cottage. Smoking is prohibited in the cottages. Pets are allowed in only some of the cottages.

21. There are lockers in the basement of the cottage where each unit owner can leave personal belongings behind in a designated locker.

22. There is a Board of Directors that is comprised of unit owners. This Board of Directors is charged with responsibility for making decisions as to whether anything is to be changed.

23. The exterior of the cottage is wood frame construction. Where the cottages are attached they are divided by a concrete wall similar to that in a duplex or townhouse. The following construction characteristics were applied in building the cottages:

- The cottages have wood frame as opposed to steel frame construction.
- Each cottage has a separate electrical panel. The voltage is similar to that found in a residential project.
- Each cottage has its own septic system, sump pump and well for drinking water.
- Each cottage has its own furnace and air conditioning unit as well as water heater and water softening system.
- The cottages come equipped with individual gas meters and water meters.
- No fire protection systems similar to those that would typically be installed in a hotel or a retirement home were installed in the cottages. For example, the cottages do not have a sprinkler system as would be found in most ICI projects.
- The piping and drain systems are the same as are typically used on a residential project.
- All Drains Wastes and Vents were plumbed in ABSDWV pipe and fittings which cannot be used in commercial construction of two stories or more.
- The plastic piping used in the cottages would not be permissible in an ICI project such as a nursing home. In ICI projects the piping must be fire rated and thus must be copper cast iron or PVC.
- The pipes were not insulated for condensation purposes as is commonly done on an ICI project.
- The hangers used to support the pipe were of a lesser gauge than is commonly used on an ICI project.
- The diameter of the pipe used is typical of a residential project. An ICI project would typically have pipe of a larger dimension to permit larger water volume.
- No recirculating lines were installed. No fire rated vents or drains were used on the projects as would be done on an ICI project.
- No fire stopping or fire proofing was used aside from that used in the concrete wall between attached units.

- The fixtures in each cottage are what you would typically see in a residential home. There are no fixtures in the cottages that one might find in an ICI project such as urinals or automated flush toilets and facets. The bathrooms are not handicap accessible as is required in areas accessible by the public.
- The windows of the cottages can be opened.
- The thickness of the wood roof shingles and the drywall is in accordance with residential standards.

24. It is not disputed that materials typical of an ICI project could have been installed on this project. It is further not disputed that the materials used on this project could be found on an ICI project depending upon its size. The only exception is that the ABS pipe used on this project could not be used on an ICI site unless it was wrapped as it is not fire rated.

25. The property is zoned by the Corporation of the Township of Muskoka Lakes as a waterfront commercial resort. The Board was provided with a document entitled "Schedule 1: Designer Information" that formed part of the Building Permit Application completed by the Firm of M. Dwyer Engineering. The document describes the MRC project as "Timeshare Residential Units". The design activities are described as "HVAC Plumbing for Residential Building". The Building Permit issued to MRC indicates that the work performed by Plumbtech was done as a residential plumbing project. The work was inspected and approved based on residential requirements. This type of project is specifically excluded from the terms of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31.

26. Very little evidence was provided to the Board concerning MRC's role following the sale of all of the units in the cottages. The parties argued the case on the basis that MRC would be the party to perform (or arrange to have performed) the upkeep of all amenities and provision of services paid for by the unit owners as part of their annual maintenance fees. By way of example, MRC will be responsible for the maintenance of the grounds and the annual maintenance of the interior of the cottages. As such, there appear to be two commercial aspects of the project from MRC's perspective. First, MRC made a financial investment in the development of the resort and sought to earn a profit from the sale of the cottages. Secondly, MRC will act in the capacity of property manager and perform all services paid for by the unit owners by way of their annual maintenance fees. To the extent that MRC can provide these services for less than it is paid it has the potential to earn an ongoing profit. MRC does not, however, stand to earn any revenue from the occupancy of the cottages after the sale of all of the units. Further, following the sale of all of the units, MRC has no interest in who occupies the cottages. Once the cottages are sold MRC's interest is confined to that of a property manager.

27. In the submission of Plumbtech, the work characteristics of the MRC project are typical of a residential project. Plumbtech does not dispute that the materials used on the MRC project could be used on either a residential or ICI project but submits that the test is not whether the same materials *could* be used, but whether such materials are *typically* used. For example, a residential home could be built with steel framing, sprinkler systems and copper piping but that is not typically done. Similarly, an ICI project could be built with a wood frame and smaller diameter pipe but such is not typically done. In the submission of Plumbtech, all of the materials used in the construction of the cottages are typical of a residential project and, as such, the factor of work characteristics suggests that this is a residential project.

28. Plumbtech distinguishes the case of *Yukon Construction Inc.*, [2004] OLRB Rep. September/October 1001 (September 2, 2004) ("*Yukon*"), in which the Board determined that the construction of condominiums that the owners were required to place into a rental pool fell within the ICI sector of the construction industry, on the basis that, in *Yukon*, the condominiums were made part of a Westin Hotel and made available to the general public for rent. In *Yukon*, the condominium owners were subject to a Rental Pool Management Agreement which required 90% of the condominium units to be available for rent as part of the Westin Hotel two-thirds of the time. As such, the condominium units at issue in *Yukon* were being used as a commercial property 60% of the time. Further, the income earned from the rental of the condominium units was shared between company operating the hotel and the condominium owner. In the submission of Plumbtech, it is significant that, in the present case, there are no limitations on what the unit owners can do with their share (their five weeks in a specific cottage) of MRC. The unit owners are free to sell their share, bequeath it to their heirs, rent the cottage out or give it to their friends to stay in free of charge. The unit owners are under no obligation to place their units in a rental pool. Rental arrangements must be made by the unit owner with the individual wishing to rent the cottage.

29. Plumbtech submits that the MRC project can be more closely analogized to 10 friends all going in together to purchase a cottage and hiring a third party to maintain both the interior of the cottage and the grounds.

30. The Union submits that there is no evidence in this case that the work characteristics of this project are typical of an ICI or a residential project. The Union argues that the work characteristics present on this job are dictated more by the size of the job than which sector the work falls within. The Union points out that many of the same work characteristics were present in the *Yukon* case and were not found to be determinative. Accordingly, the union submits that the only relevant factor in this case is end use.

31. In the Union's submission the end use of the project is not a residential home. People will not live in the cottages on a full-time basis. The Union submits that this fact makes the cottages even more removed from being a residential project than student housing or a retirement home, both of which have been found to be in the ICI sector of the construction industry (see: *Sword Contracting Limited*, [1985] OLRB rep. May 743 (a nursing and retirement home); *Modern Mechanical Contracting Ltd.*, [1999] OLRB Rep. July/August 655 (a retirement residence); and *Toronto Construction Association General Contractors' Section*, [2004] OLRB Rep. November/December 1216 (December 20, 2004) (student residence)).

32. The Union argues that the MRC project is a vacation resort whether it is looked at from the perspective of the resort developer or from the perspective of the unit owners. The resort developer has developed many other ICI resorts. The Union argues that it can be assumed that the developer must have asked itself how it could finance and make a profit out of a resort property. The developer could have financed the property itself and then hoped to make enough money to pay down the debt with the ultimate goal of selling the resort at a profit. That, according to the Union would have been a commercial undertaking. Here, however, the developer chose to get people to pay money up front thereby relieving itself of the need to invest its own money. The developer remained interested in making a profit from the sale of the property and making an ongoing return on the operation of the property. Thus, the Union submits that the MRC project was entirely a commercial development from the perspective of the developer.

33. Turning to the perspective of the unit owners, the Union argues that they are getting a vacation getaway. Rather than purchasing a vacation each year, they pay the money up front on the basis that it is a good investment. Equally, the unit owners can trade off their points in their cottage and travel to another destination elsewhere in the world. A unit owner may in fact never go and stay at his or her own cottage. The Union argues that the purchase in a share of a MRC cottage is no different that the purchase of a golf membership. The Union argues that, even if a unit owner stays in the cottage two weeks per year, the unit owner is clearly not residing in the cottage.

34. The Union points out that the property is zoned commercial and is not covered by the *Ontario New Home Warranties Plan Act*. The property is managed by a hotel management company and there are services, such as weekly cleaning, that the unit owners are required to pay for in their annual maintenance fee. There are rules, such as the prohibition on smoking or altering the furnishings in the cottage, that are unheard of in a traditional residence. Thus, the Union argues that from the perspective of the unit owners, this project is an ICI project.

35. In reply, Plumbtech points out that the retirement home cases involved a number of features that supported a finding that the project was in the ICI sector that are not present in this case. By way of example, in *Modern Mechanical Contracting Ltd., supra,* there was a common kitchen and dining area, a nursing office, RPN's on staff, and nurse call buttons in the bed or bathrooms. The Board stated at paragraph 39 that "the provision of medical assistance of various types is what causes the Board to consider the Kingsway [the retirement home] institutional in nature". In the case involving student residences, *Toronto Construction Association General Contractors', supra,* the Board found at paragraph 22 that the project was not just an apartment building to provide housing for students attending the University of Toronto, but rather it was also "an integral element of the University's institutional academic program."

36. Turning to the Union's submissions that the project ought to be looked at from the perspective of the developer and the unit owner, Plumbtech submits that this is not helpful. Plumbtech points out that, from the perspective of a residential developer, a residential project is a commercial undertaking. The developer's "perspective" does not result in the project being in the ICI sector.

37. For the reasons that follow, it is my determination that, based on the facts that I have before me, the MRC project falls within the residential sector of the construction industry.

38. While I agree with the Union that this project does not have any work characteristics that could not also be found on an ICI site, it is noteworthy that every one of the work characteristics on this project are "typical" of a residential home. No work characteristics "typical" of an ICI project appear to be present on this project. Further, in every respect, the cottages resemble a residential home.

39. Turning to end use, I do not consider the fact that the unit owners have amenities available to them as indicative of the project being in either the ICI or residential sector. There are residential condominium developments that provide amenities such as pools, tennis courts and basketball courts. Similarly, there are commercial resorts that offer these types of amenities to the guests. The existence of these amenities is not, in this case, particularly helpful. It is noteworthy, however, that the amenities at the MRC resort are paid for by the unit owners as part of their annual maintenance fee as opposed to being included in "rent" or paid for based on usage as would be more typical of a commercial resort.

40. The requirement that the unit owners have the cottages cleaned weekly and the prohibition on smoking or pets in many of the cottages is not typical of a residential development. Rather, these types of rules and requirements are more typical of a commercial undertaking such as a hotel or resort. In the case of a hotel or a resort, the owner wants to ensure that the units are kept clean and in good repair in order that the owner can rent the unit out again in the future for the maximum amount of rent. The unit's cleanliness is related to the owner's operation of an ongoing commercial undertaking. The rules and requirements exist in order to maximize the rental income to be earned.

41. However, in this case, the rules and requirements concerning smoking and cleanliness are in place to ensure that the cottage remains comfortable for all of the owners (or their guests) and to limit the costs that the owners of each cottage will incur in maintaining the cottage. The owners are not seeking to advance a commercial undertaking; they are seeking to ensure that they each take proper care of their common property.

42. It is true that the unit owners may never use the cottages and, if they did, would more than likely spend a very small percentage of the total year at the cottages. I do not see the amount of time that the unit owners spend at the cottages as determinative. A store can be built and never opened. The fact that the building never functioned as a store would not change the project's character from being a commercial project. Similarly, a house can be built and never occupied but that would not change its character from being a residential project. The amount of time that the property is used for a particular purpose is likely only relevant where, as in the *Yukon* case, one single unit has multiple uses. In this case, the cottages have only one use – people own them and can then utilize them as they wish by staying in them, renting them out, loaning them to friends or selling them. These are principally residential uses. While the occupation of the cottages through The Registry Collection may constitute a commercial use, the Board does not have sufficient evidence before it to make such a finding in this case. Further, and in any event, given the stage of the project, the extent to which the cottages will be occupied by people who exchanged their credits in a property elsewhere in order to "access" a cottage at MRC is unknown.

43. In addition, contrary to the cases involving retirement homes and student housing, the very occupation of the cottages, is not integrally connected to a commercial or institutional undertaking. In the retirement home cases, while the retirement homes were a residence for the occupants, the home was, at the same time, a commercial undertaking unrelated to the mere provision of a residence. The retirement home operator provided a home for the residents but also operated, within that home, and in respect of the residents, a commercial undertaking. In the student housing cases, the owner provided student housing, but at the same time, used that housing and the occupation thereof in a way to advance its institutional goals and thereby advance its institutional undertaking. In both cases, the premises could only be occupied by people who would also be the subject of the commercial or institutional undertaking. In the present case, MRC sells cottages and its property management services, but provides no services nor operates a commercial undertaking within the MRC resort that is integrally connected to the occupancy of the cottages. The role MRC plays is similar to that of a typical condominium property management company. MRC may be owned by a hotel management company but it is not acting as one in connection with this project.

44. In light of the foregoing considerations that point to the MRC project falling in the residential sector, I do not consider the fact that the land on which the project is built is zoned commercial or the fact that the cottages are not covered by the *Ontario New Home Warranties Plan Act* to be sufficient to warrant a determination that the MRC project is in the ICI sector.

45. For the foregoing reasons, it is my determination that the factors of work characteristics and end use support a finding that the MRC project is in the residential sector of the construction industry and I so find.

46. The applicant is directed to advise the Board within 30 days of the date of this decision as to how it would like to proceed.

2983-06-R Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newsmedia Guild, Applicant v. **Sun Media Corporation;** Sun Media (Toronto) Corporation; The London Free Press, A Division of Sun Media Corporation; and Sun Media Corporation c.o.b. as The Ottawa Sun, Responding Parties

Related Employer – Sun Media restructured some of its operations to establish what it called "Centres of Excellence" to create common content for potential use across the Sun chain – To do so, it took employees from its daily papers to create content; those employees were treated as not falling under any of the existing collective agreements – The union sought a declaration that Sun Media was related to the organized newspapers and asked the Board to order that the work in question be returned to the newspapers – The Board found that the union was able to demonstrate the criteria for a related employer declaration given the significant role the corporate entity plays in labour relations – The union proved that, although Sun Media's motivation for the restructuring may have had legitimate business underpinnings, the result was a diminution of bargaining rights for some individual newspapers – The union should at the very least be allowed to bring Sun Media to the arbitration table to assert its rights under the respective collective agreements – The Board issued the related employer declaration but declined to return the work to the individual newspapers

BEFORE: *Brian McLean*, Vice-Chair

APPEARANCES: *Howard Goldblatt* and *Howard Law* for the applicant; *Richard Charney* and *Michael Torrance* for the responding parties; *Chris Krygiel* for Sun Media Corporation; *Chris Harrison* for Sun Media (Toronto) Corporation; *Nancy Tyndall* for The London Free Press, A Division of Sun Media Corporation; *Mike Therrien* for Sun Media Corporation c.o.b. as The Ottawa Sun.

DECISION OF THE BOARD; September 11, 2009

1. This is an application under section 69 and/or 1(4) of the *Labour Relations Act, 1995* (the "Act").

2. By decision dated June 26, 2007 the Board (differently constituted) dismissed the application under section 69 of the Act. It also dismissed one of the remedies requested by the applicant under section 1(4), that being the consolidation of various bargaining units of the responding parties. However, the applicant continued on with the remainder of the section 1(4) application.

3. A three person panel of the Board commenced hearing this matter. Sadly, before the hearing concluded, Board Member Rene Montague died. With the consent of the parties and at the direction of the Chair of the Board, I continued the hearing sitting alone.

4. This is an application which occurred after Sun Media Corporation ("Sun Media"), which is the parent company of newspapers which are organized by the applicant, allegedly moved work out of the newspapers to itself. Sun Media is not organized. The applicant seeks to have Sun Media declared to be a single employer with the newspapers and also seeks, as a remedy under s. 1(4) of the Act, to have the Board order that the work in question be returned to the newspapers.

The Facts

5. Sun Media publishes a number of newspapers across Canada. In addition to the newspapers which are responding parties in this application it also publishes the Calgary Sun, the Edmonton Sun, the Winnipeg Sun, Le Journal de Montreal and Le Journal de Quebec. Sun Media also publishes commuter dailies such as "24 Hours" and several local newspapers like the Simcoe Reformer (where the applicant also has bargaining rights) and papers operated by Osprey Media. Sun Media owns Sun Media (Toronto) Corporation which in turn publishes the Toronto Sun. Sun Media is itself a subsidiary of Quebecor Media Inc.

6. The employees of the three responding party newspapers are partially unionized. The applicant represents employees of the Sun Media (Toronto) Corporation, which publishes the Toronto Sun, in the following "all editorial employees" bargaining unit:

> all employees in its Editorial Department in the City of Toronto save and except for Editor-in-Chief, Managing Editor, Executive Assistant to the Editor-in-Chief, Assistant Managing Editors – News Editor, City Editor, Associate City Editors (2), Sports Editor, Executive Assistant to the Sports Editor, Entertainment Editor, Associate Entertainment Editor, Executive Assistant to the Entertainment Editor, Editor Op-ED, Senior Associate Editor Op-Ed, Lifestyle Editor, Money Editor, Photo Editor, Research Director, Art Director, and additional positions exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Labour Relations Act.

7. The applicant represents employees of the London Free Press, a Division of Sun Media Corporation in an Editorial Department bargaining unit as follows:

> all employees of the Employer employed in its Editorial Department, save and except Editor-in-Chief, Editor, Managing Editor, Assistant Managing Editor, news Editor, Business Editor, City Editor, Sports Editor, Today Editor, Art Director, Saturday Editor, Librarian and Office Manager, employees exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Labour Relations Act, and high school students on a co-operative training program.
>
> The Employer also recognizes the Union as the exclusive bargaining agent for employees of FYI London and London This Week save and except advertising employees.

8. The applicant also represents employees in an "all editorial employees" bargaining unit at the Ottawa Sun. At the time of the hearing of these applications those parties had not yet concluded their first collective agreement.

9. Most of the major Sun papers operate under the Sun "formula". That is they have a right of centre political philosophy, "Sunshine girls/boys", and a focus on crime news and sports.

10. The events which gave rise to these applications took place in a rapidly changing business climate for print newspapers. The newspaper industry has always been very competitive. However, new technology, particularly the internet, has presented additional and relatively sudden new challenges. Readership of the major printed newspapers, including the Sun chain, has declined steadily, with little prospect of returning to previous levels. (I note that these issues are faced by newspapers all across North America. For example, following the hearing of this matter the Rocky Mountain News in Denver and the Seattle Post-Intelligencer announced that they were going to publish only on-line and the Los Angeles Times laid-off 300 of its employees.)

11. Over time Sun Media has dealt with these challenges in a variety of ways, including staff cuts and the creation of an on-line presence (canoe.ca). This application concerns one of the strategies adopted by Sun Media: the creation of what it calls "Centres of Excellence". Centres of Excellence were basically a way to create common content for potential use across the Sun chain. The Centres of Excellence were established on the basis of the sections of the newspapers: there was a sports Centre of Excellence, a business Centre of Excellence, etc.

12. As a result of the increased use of across the chain content in the Centres of Excellence, Sun Media took employees from its daily papers to create such content. These employees are employed by Sun Media and are treated as not falling under any of the newspaper collective agreements.

13. The only witness in this case was Glenn Garnett, Sun Media Executive Editor in Chief for Sun Media English Urban newspapers. As such, Mr. Garnett is in charge of content for newspapers in Ottawa, Toronto, London, Winnipeg, Calgary and Edmonton. Mr. Garnett was an honest and forthright witness. Mr. Garnett testified that one of the central and at times challenging tasks for a newspaper is to fill its pages each day with content that is of interest to readers. In practice this content comes from a variety of sources. These include the wire services, like Canadian Press (of which Sun Media is the largest member), Associated Press, Getty, and Reuters which provide news stories, sports stories and political comment from Canada and around the world.

14. Sun Media also has a Parliamentary Bureau which acts like an internal wire service for National Political stories. The Parliamentary Bureau consists of a columnist and three reporters based in the National Press Building in Ottawa. They are excluded from the Ottawa Sun bargaining unit. The content created by the Parliamentary Bureau can be and is used by any newspaper in the chain. The staff at the Parliamentary Bureau report to the editor-in-chief of the Toronto Sun.

15. In 1999 and 2000 the President of Sun Media asked Mr. Garrett to head up a task force of senior editors to look into ways to better pool (that is share) content as a response to the decline in readership and to create efficiencies. Senior management believed that Sun Media could do a better job of identifying its best writers and publish them across the chain. In addition, it seemed to make sense to better co-ordinate the creation and production of content across the chain, so, for example,

the Toronto Sun, the Calgary Sun and the Edmonton Sun, would not all send staff to cover an event like the Super Bowl.

16. The Task Force was formed at about the same time as the chain was laying off staff.

17. The Task Force did its work over a period of approximately one year. Mr. Garnett and the editors-in-chief of the various papers identified the chain's main writers for entertainment, sports, political commentary, and lifestyle. The outcome was that the centralized writers would create content for use across the chain including canoe.ca. So, for example, there would be one entertainment columnist who might be from Winnipeg and would focus on national (rather than local) entertainment stories rather than have each of the papers have their own columnist writing about national entertainment stories. These entertainment columnists and reporters would report to a National Entertainment Editor who was in charge of the Entertainment Centre of Excellence.

18. In 2006 Mr. Garnett identified National Editors in News, Entertainment, Sports, Comment, and Business to head a "Centre of Excellence" in each of these areas. The National Editors were responsible for working with the local papers to develop strategies on the coverage of events and stories and to put together a package of content useful for the papers and on-line. The National Editor generally also remained as an editor at their local paper. Mike Therrien (Editor-in-Chief of the Ottawa Sun) was National Editor for News. Paul Benton (Editor-in-Chief of the London Free Press) was made National Comment Editor. John Kyle (Toronto Sun Entertainment Department) was made National Entertainment Editor. P.J. Hurston (Business Editor of the London Free Press) was National Business Editor and Chris Nelson (Editor-in-Chief of the Calgary Sun) was made the National Sports Editor.

19. The National News Editor is also responsible for the Ottawa Parliamentary Bureau of Sun Media and oversees a team of feature writers to create national feature stories. The feature writers are employees of Sun Media, as opposed to any of the newspapers. There are also Sun Media graphics employees who do the lay out for National stories who work for Sun Media and formerly worked for the London Free Press. There are eleven national employees who could be or formerly were in one of the Newspaper bargaining units. It is these eleven employees, (which include the four employees at the Ottawa Bureau who the union now concedes ought not to be subject of this application) that are the immediate focus of the union's application.

20. The subject employees based in London are led by an employee, a graphic editor, who was in the London Free Press bargaining unit. There are also four graphic artists and one copy editor located there. The employees based in London work at Sun Media Central Graphics but not in the same building as the London Free Press. They are dedicated to building shared graphics to go into the urban dailies to go with national chain wide stories. The work they do is no more directed to the London Free Press than it is to any of the other Sun dailies. They do not work with London Free Press bargaining unit employees. They report to Mike Therrien the National News Editor in Ottawa.

21. Four of the subject employees are based in Toronto, located in the same building (third floor as opposed to second floor for Toronto Sun reporters)) as the Toronto Sun bargaining unit employees although Sun Media is in the process of finding alternate space. They are not integrated with the Toronto Sun employees, do not work with Toronto Sun reporters and do not report to the editor-in-chief of the Toronto Sun. In Toronto there are three reporters and one editorial co-ordinator who were transferred to Sun Media.

22. Once a week the National Editors and other Senior Editors meet via conference call. They discuss the major stories for the upcoming week and decide which employees can best be deployed to write about them. The employees selected might be Sun Media employees or they might be employees of one of the newspapers.

23. Occasionally, bargaining unit employees in Toronto, Ottawa and London are assigned to carry out work that is intended to be distributed chain wide. For example, a Toronto Sun Columnist was asked to write a series on the tenth anniversary of Princess Diana's death because the Editors felt she was the best person to do it. That series was distributed chain wide.

24. There has always been content sharing at Sun Media. However, what Sun Media argues is different about the Centres of Excellence and the corporate employees is that their *focus* is national stories which allows local editors to be focused on local stories. The national editor can focus on stories with a cross-country appeal. The national editor has a select group of corporate employees to assign to these stories. The Centres of Excellence allowed the Sun to pool resources better and, at the same, cover stories with the best people.

25. In addition, the existence of corporate employees clarify the chain of command, budgetary and resource issues. Removing the corporate employees from local responsibility (rather than, simply not assigning them local stories) eliminates conflict with local responsibilities. They do not have two bosses, and when they are assigned a national story for use across the chain there are no issues about whether the budget of Sun Media or the newspaper bears the cost.

Decision

26. In summary, Sun Media responded to economic challenges and decided to create efficiencies generally by establishing a mechanism for creating content for use across the Sun chain. There is no doubt it could have done this by simply using stories/material created for and by one newspaper across the chain. In fact this did happen and still happens. However, creating chain wide content at the individual newspaper level can lead to certain issues. First, there may be duplicate coverage of stories by two or more papers in the chain, leading to inefficiencies. Second, there are budgetary issues, so that it becomes problematic from a budget perspective to have, in effect, one newspaper in the chain spend the money to create content for other papers.

27. To address these issues the Sun established processes to create chain wide content, including graphics, outside of the existing newspaper structure. It took employees out of the newspapers and put them in the employ of Sun Media. This is problematic for the union. Union employees were placed in non-union positions and engaged in similar (or the same) kind of work. Some of the employees would have been laid off, but were retained by Sun Media and other more senior employees were laid off.

28. I apply the law to the foregoing facts.

29. Section 1(4) of the Act states:

> 1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any

> combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

30. Section 1(4) is designed to deal with situations where more than one legal entity operates related businesses or activities under common control and direction where it may not make industrial relations sense to allow the legal form to dictate and possibility fragment the collective bargaining structure. There are three conditions which must be met before the section can be applied:

> (a) there must be more than one corporation, firm or individual etc. involved;
>
> (b) the entities must be engaged in associated or related business activities; and
>
> (c) these entities must be under common control or direction.

31. There are two parts to the Board's analysis of a s. 1(4) application. First, the Board must determine whether the conditions to a s. 1(4) declaration have been met. That is, there must have been two or more entities, who are engaged in associated or related businesses under common control or direction. The second part of the analysis is an assessment of whether the Board should exercise its discretion to make a declaration. There have been many cases which discuss the circumstances under which the Board will exercise its discretion to make a declaration. Most of these cases can be reduced to this statement: a declaration will be made when there is a labour relations reason for doing so.

32. In this case the employer argues both that the conditions to a s. 1(4) application have not been met and that the Board ought not to exercise its discretion to make a single employer declaration in any event. Sun Media does not dispute that there are two or more corporations, firms or business entities. Therefore, I first consider whether the last two of the three conditions under s. 1(4) have been met.

33. In my view the various newspapers and Sun Media are clearly associated or related businesses. They are all (at least in part) in the newspaper business. They share content and the "Sun Formula". Except for the London Free Press, they operate under the same "Sun" banner.

34. Sun Media disputes that the corporation or entities are under common control or direction. Sun Media argues that the fact that Sun Media owns the other responding parties is not enough to make out the common control or direction criteria. In its submission there must also be evidence of managerial control over the employees or labour relations of the employees of the subordinate entity. In this case, it argues, labour relations is controlled on a newspaper by newspaper basis. It relies on *Ontario Legal Aid Plan,* [1991] OLRB Rep. November 1327, where the Ontario Court of Appeal states:

> I agree with this observation. I appreciate that s. 1(4) is intended to ensure that the Board can take into account labour relations reality without regard to

> legal form, and that, in a proper case, it is fully entitled to pierce the corporate or other legal veil to give recognition, for labour relations purposes, to what is in essence an employer-employee relationship. Where employers are closely related, it is often difficult to define the employment relationship. But the look behind the corporate or legal veil must reveal that there are sufficient indicia of the *managerial* control normally exercised by an employer over its employers to constitute a *de facto* employment relationship.

35. Sun Media also relies on *Toronto (City)* [2006] OLRB Rep. Sept./Oct. 681 (Sept. 27, 2006) where the Board, in finding that the City of Toronto and the Toronto Community Housing Corporation ("TCHC") were not under common control and direction stated:

> 92. While the City could tomorrow either amend the Shareholder Direction or perhaps apply it differently so as to exercise day-to-day managerial control over the TCHC, that has not in any way occurred over the course now of some five years since the TCHC was brought into existence. Just as in *Legal Aid*, where the Law Society of Upper Canada exercised in a general sense, the power of life and death over legal aid clinics, this form and type of overall general control is not sufficient to permit the Board to find that there is common control and direction for purposes of section 1(4) of the Act. In the present case, as in *Legal Aid*, the entity with overarching control plays no role in the day-to-day management of the enterprise. There is no way in which it can be said that the City acts as employer of employees of TCHC. The City has had no involvement with labour relations or employment matters. Just as the Law Society was not in the business of providing legal aid services, neither is the City (any longer) in the business of providing public housing services.

36. Sun Media says there is no evidence that it exercised this kind of managerial authority with respect to the newspapers.

37. I am satisfied, Sun Media and the various newspapers are under common control and direction. While there is largely local control of labour relations, it is also the case that Sun Media can play a significant role. For example, Sun Media may decide that a number of employees at each paper need to be laid off or hired. Sun Media through the Centres of Excellence also has a say in where employees are to work – for example in deciding that certain reporters will attend particular events. This kind of work direction, even though not necessarily on a day to day basis, is a hallmark of managerial control.

38. I turn to the issue of whether I should exercise my discretion to make a single employer declaration under s. 1(4). At one level, the circumstances before me can be viewed as a straightforward section 1(4) application. Sun Media is a non-union employer which controls a number of unionized newspapers. Sun Media had not previously employed employees to produce content, or if it has, it has done so in particular areas (like the Parliamentary Bureau). In a recent development, Sun Media has hired new non-union employees to do work which undisputedly could be performed by employees of its unionized business. This has had the effect of diminishing the union's bargaining rights and the employees' collective agreement rights. Junior employees have been retained by Sun Media while more senior employees have been laid off by the newspapers.

39. Nevertheless, the question of whether the Board should exercise its discretion to make a single employer declaration is a difficult one. As is unfortunately typical in this industry, the union's bargaining rights are restricted to a department in each individual newspaper. Newspaper content is frequently created by non bargaining unit individuals including the wire services. It is not at all clear that the work in question could not have been performed by employees whether union or not, who work at one of the out of province Sun newspapers. A single employer declaration may not solve the problem the union faces.

40. The union recognizes the problem for, in addition to the declaration, it asks the Board to return the work transferred out of the bargaining unit. The Board has never made such an Order in a related employer application, but it argues that the Board can do so as s. 1(4) permits the Board to "grant such relief, by way of declaration or otherwise, as it may deem appropriate".

41. The union is concerned that technology has allowed the employer to create "virtual" businesses. Technology permits employees to work on the newspaper, write stories, create pages, and create graphics, from anywhere in Ontario or the world. The union is concerned that in these circumstances the scope of its bargaining rights cease to have protective meaning. It urges the Board to adapt to the technology and create remedies which can address these new issues.

42. I am satisfied that Sun Media's actions, while carried out for legitimate business purposes, have potentially diminished the union's bargaining rights at least in Toronto and London. In the case of the Toronto Sun, Sun Media has simply moved employees down one floor in the Sun's building, transferred them to Sun Media and from there they engaged in work which is similar, and in some cases identical, to the work they carried out for the Toronto Sun. It is not at all surprising that the union takes issue with that transfer.

43. It may be that the scope of the applicants' bargaining units means that the applicant has no remedy at arbitration irrespective of a related employer declaration. This is not unusual in labour relations in Ontario. For example, all who practice before the Board understand that if a union has bargaining rights restricted to a municipality and the employer moves the plant across the street, to a different municipality, the union's bargaining right may be effectively lost in the absence of anti-union animus. However, these are issues which, in the context of this case, are best determined by an arbitrator. The union has at least an arguable case. The existence of two corporations or businesses ought not to prevent the union from seeking the determination of a grievance when the answer is not clear.

44. A similar issue was before the Board in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7135 v. National Steel Car Limited,* 2009 CanLII 3548 (On L.R.B.) (ON L.R.B.) (January 19, 2009). In that case the Board stated:

> 10. The union, therefore, has established all the elements for a single employer declaration. NSCL and UPCL are under common control and direction, and they are related or associated businesses or activities. In my view, the union has also made out an arguable case - not contradicted by anything the responding parties have had to say - that there is a reason to make the declaration under subsection 1(4). That is, without the declaration, the union has no basis upon which to assert the existence of a right under article 7.12(10) of the collective agreement that potentially protects the work

> of the bargaining unit in Hamilton. In saying that, I am not suggesting that the union will necessarily prevail with respect to any argument it may make concerning article 7.12(10) before Arbitrator Brown. It may be that NSCL's argument concerning the interpretation and application of article 7.12(10) will be preferred by the arbitrator. However, NSCL ought not to prevail on that issue merely because it has organized its business in a manner that incidentally thwarts the union's opportunity to advance the assertion of a right under the collective agreement. That would constitute an unwarranted frustration of the contractual rights of the bargaining unit members, precisely the type of mischief contemplated in the *Brant Erecting and Hoisting* decision.
>
> 11. As the Board noted in *KNK Limited*, [1991] OLRB Rep. Feb. 209 and more recently in *Humphrey Plumbing & Electrical Service Ltd.*, [2006] OLRB Rep. July/Aug. 519, where a trade union has made out the elements for a common employer declaration and established the existence of the mischief for which such a declaration was designed to prevent, the Board will normally issue the declaration in the absence of significant prejudice or a compelling policy reason not to do so.

45. In *KNK Limited*, [1991] OLRB Rep. Feb. 209 stated:

> 57. In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very "mischief" upon which the union relies and for which section 1(4) is a remedy.

46. In the case before me, there is no suggestion of any hardship to any of the responding parties if the declaration is made. A declaration will merely reflect the reality of the situation: Sun Media has substantial power over the labour relations issues which affect the employees of the various newspapers. Moreover, the kind of "mischief" which s. 1(4) is designed to address is present in this case even if there is a serious issue about whether some or all of that mischief can be solved by the s. 1(4) declaration. At a minimum, a single employer declaration brings Sun Media to the bargaining table so that these important issues can be discussed.

47. In my view a s. 1(4) application ought not to be a contest over the proper interpretation to be given to a collective agreement unless the interpretation is clear. Where the conditions as set out in s. 1(4) for a declaration are present and where there is arguable labour relations mischief as a result of the existence of separate corporations or business entities then a declaration should issue.

48. I therefore find it appropriate to exercise my discretion to make a declaration under s. 1(4).

49. In his submissions, counsel for the applicant asserted that any s. 1(4) declaration would be ineffective without the Board, at the same time, making an order requiring the return of the work to the bargaining units from which it came. However, I conclude that I ought not to Order the employer to return work from the Centres of Excellence to the bargaining units as requested by the union. In my view, Orders made under s. 1(4) ought to relate directly to the purposes of the section. That is to say, they ought to relate to the protection and preservation of the union's bargaining rights however those rights are defined and protected in the collective agreement. Once those rights are protected it is up to an arbitrator to determine if a Collective Agreement has been breached and, if so, what remedy should follow.

50. I acknowledge that the union is in a difficult situation. However, it was open to the union to organize newspapers in a way which was more protective of its rights. (I note that the union organized the Ottawa Sun after these issues became apparent). It was also open to the union to negotiate work protections into the collective agreement. Perhaps it was unable to do so, but the Board ought not to insert itself into the collective bargaining relationship by effectively imposing a no contracting out provision, which is what the union seeks in this case. The union's request effectively asks the Board to sit as a rights or interest arbitrator.

51. The transfer of work or employees out of the bargaining unit is not something that s. 1(4) is directly concerned with. Moreover, s. 1(4) ought not to be used to prevent an employer's legitimate commercial activities. Section 1(4) has never been used to stop an employer from creating another corporate entity through which to conduct its business. Section 1(4) exists to ensure that the union's bargaining rights, as expressed in the collective agreement, attach to the new corporate vehicle. To grant the remedy requested by the union would mean that the employer could not achieve the legitimate budgetary and work management goals it seeks to achieve by running central content creation. It does not matter that the employer could do the work through its newspapers and that the employer's budget concerns could be addressed by means other than running national content creation through Sun Media. In the absence of anti-union animus these kind of restrictions should not be imposed by the Board, but rather need to be obtained by the union in bargaining.

52. For all of the foregoing reasons, I declare the responding parties Sun Media, London Free Press, Ottawa Sun and Toronto Sun to be a single employer for the purposes of the Act.

0643-09-U Sheet Metal Workers' International Association, Local 51, Applicant v. **Trudel & Sons Roofing Ltd.**, Responding Party

Change in Working Conditions – Construction Industry – Unfair Labour Practice – The work at issue (installation of a complete ice and water shield on three cottages) occurred during the time period established by s. 86(1) of the Act – The employer refused to pay the collective agreement rates arguing that those rates did not apply since the work was not bargaining unit work and it was not covered by the collective agreement in any event – The Board found that s. 86(1) freezes "not simply the rights and obligations established by a collective agreement but also *privileges* and *duties* which are beyond parties' strict legal rights and obligations" – The Board found that in this context (low-rise residential) where roofers were assigned to do work, and not advised that the collective agreement rates would not apply,

the parties' reasonable expectations were that the collective agreement rates would apply – Accordingly the employer's failure to establish a different rate before the work started, "represents the removal of a privilege that these roofers have as a result of past conduct and which is therefore preserved by the provisions of s. 86(1)" – Application granted, in part; damages awarded

BEFORE: *Mark J. Lewis*, Vice-Chair.

APPEARANCES: *S.B.D. Wahl, R. Shewell* and *R. Hayes* appearing for the applicant; *Mark Geiger* and *Rich Trudel* appearing for the responding party.

DECISION OF THE BOARD: October 19, 2009

1. This is an application filed under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") in which the applicant (the "Union" and/or "Local 51") alleges that the responding party ("Trudel" and/or the "Company") has violated various sections of the Act, including subsection 86(1), with respect to a payment made by Trudel for the installation of the ice and water shield for the roofs of three cottages in Tiny Township which was performed, for Trudel, by Roger Hayes and his roofing crew.

The Facts

2. For a number of years Local 27 of the Carpenters Union was the bargaining agent for Trudel's roofers working in part of the low-rise portion of the residential sector of the construction industry in the Province of Ontario. The last collective agreement between Local 27 and Trudel was entered into in the summer of 2007 and purported to be effective, on its face, from July 31, 2007 until April 30, 2010.

3. On April 14, 2009, Local 51 was certified by the Board as the bargaining agent for Trudel's roofers that had previously been represented by Local 27. On April 15, 2009, Local 51 gave notice to bargain, in accordance with the Act, to Trudel.

4. In or about the final weeks of April, 2008, Roger Hayes, a crew leader who has performed roofing work for Trudel for approximately fifteen years, was asked by one of the Company's foremen to perform the roofing work on three cottages which were being built on Lots 1, 2 and 3 of Georgian Drive in Tiny Township. These three cottages are apparently individually owned by Michael, Chris and Matt Bratty, who are also the owners and/or senior employees of Remington Homes, a residential builder that Trudel does a large amount of work for.

5. Part of the roofing work which Mr. Hayes and his crew had to do, on each of the cottages, involved installing ice and water shield (which is a stick-on protective membrane that is applied to the plywood of a roof prior to the roof shingles being installed) over the entire roof deck. This was extremely unusual as normally the ice and water shield is only installed on parts of the roof, and in particular along its outside edges. In fact, Richard Trudel, one of the owners and key employees of the Company, could only remember one other house where ice and water shield had been installed over the entire roof deck in his more than thirty years of working in this industry.

6. In the last week of April, Mr. Hayes filled out and submitted a book-in sheet which listed, amongst other work, the ice and water shield work which had been done on Lot 1 and charged for his crew's work at the rates set for ice and water shield installation by the (Local 27) Collective Agreement. Trudel paid Mr. Hayes for the work on this book-in sheet, in full, on April 30, 2009.

7. In the second week of May, Mr. Hayes filled out and submitted a book-in sheet which listed, amongst other work, the ice and water shield work which had been done on Lots 2 and 3 and once again charged for the work at the rates provided for in the Collective Agreement. This time, however, on May 15th, Trudel only paid one half of the amount which Mr. Hayes had invoiced for the ice and water shield work.

8. Richard Trudel testified that he had personally given the instructions to reduce the amount paid for the second book-in sheet. He stated that he did this as he felt that: the work on these cottages was not covered by the Collective Agreement; the rate in the Collective Agreement for ice and water shield installation did not, in any event, apply when the whole roof deck (as opposed to the edges) was to be covered; and, because he had instructed his foreman to tell Mr. Hayes that Trudel would pay a dollar a linear foot for the ice and water shield installation when assigning the roofing work on these cottages to him. Mr. Tudel explained that he felt that this lower (one dollar) rate was fair as, in his view, installing the shield on the edges of a roof (for which he understood the Collective Agreement rates had been set) was much more difficult than installing the shield over the remainder of a roof. He further testified that Trudel had paid the first book-in sheet in full because he personally had not seen it prior to the Company making the payment.

9. Both parties agree that, despite his instructions, Trudel's foreman never told Mr. Hayes about the lower rate which Mr. Trudel wanted to pay for the work and that the difference between the amount claimed by Mr. Hayes and the amount paid by Trudel is $3,953.00.

Allegations Concerning Sections 70, 72, 73 and 76

10. Local 51 alleges that Trudel reduced the amount that it was prepared to pay to Mr. Hayes for the work on these cottages in an effort to punish him because, in the period between the first and second book-in sheets, it became aware that he supported Local 51 as opposed to Local 27 and that Trudel has thereby violated sections 70, 72, 73 and 76 of the Act. Based on the evidence which I heard, I find that Trudel's actions concerning Mr. Hayes were in no way related to which union he was known or believed to support. Accordingly, this application as it relates to these four sections of the Act is hereby dismissed.

Allegations Concerning Section 86

11. The Union also alleges that by refusing to pay the full amount of the second book-in sheet to Mr. Hayes Trudel has violated the *freeze* established by section 86(1) of the Act, which reads as follows:

> **86.** (1) Where notice has been given under section 16 or section 59 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the

> consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,
>
> (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
>
> (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
>
> (ii) 14 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,
>
> as the case may be; or
>
> (b) until the right of the trade union to represent the employees has been terminated,
>
> whichever occurs first.

12. Both parties agree that the work in question and Trudel's decision not to pay the full amount of the second book-in sheet occurred within the time period established by subsection 86(1). The question to be determined here is then - in these circumstances, is Trudel required by the provisions of subsection 86(1) to pay Mr. Hayes at the rates set out in the Collective Agreement for the ice and water shield installation work which was done at these cottages?

The Law

13. Both parties were essentially in agreement with respect to the Board's jurisprudence concerning section 86(1) freezes. In particular both parties emphasised that what is *frozen* under this section of the Act is not simply the rights and obligations established by a collective agreement but also *privileges* and *duties* which are beyond parties' strict legal rights and obligations. In this respect, the Board stated the following in *St. Mary's Hospital,* [1979] OLRB Rep. August 795 concerning such privileges:

> 10. Section 70(2) preserves not only the employees' terms and conditions of employment, but also *privileges* which, by reason of custom and practice, have become a part of the employment relationship. The term "privilege" is extremely broad and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a "right." In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case since privileges can arise from established custom, practice, or policy. The question is an evidentiary one for, by definition, the Board's consideration must go beyond the strictly legal incidents of the relationship ("rights") and include those aspects of the relationship which give rise to "privileges."
>
> 11. In order to demonstrate the existence of a privilege, it is not necessary to establish a contractual right, a formal written policy, or an express

> promise. It is sufficient if there is an established, and well entrenched, course of conduct which gives rise to the reasonable expectation that a benefit, previously given, will be continued. In this case the Board is unanimously of the view that such a pattern exists. As the respondent's payroll supervisor candidly admitted, the full-time and part-time employees have always been treated "the same" with the sole exception of the latest wage increase. Mrs. Brown also candidly admitted that, having regard to the employer's past practice the part-time employees quite reasonably expected that this policy would continue. This expectation was, of course, reinforced by the employer's October 27th notice which suggested that a general salary re-evaluation for *all employees* would be forthcoming in the near future. In the circumstances, therefore, the Board is satisfied that the respondent's failure to grant the same salary increase to part-time employees as it granted to full-time employees was an alteration of a privilege. Counsel for the respondent put great emphasis on the fact that the most recent wage increase had been described by the employer as an "interim" wage increase. It was submitted that because the employer had not previously granted "interim" wage increases there was no established practice which could be characterized as creating a privilege. The evidence indicates that following the imposition of the Anti-Inflation guideline, various wage increases were regarded as "interim", at least in the sense that they were subject to the approval of the Anti-Inflation Board; but in any event the privilege established was with respect to common treatment for full-time and part-time employees. There is no doubt that the employer has failed to follow its practice in this regard.

14. Although, in *St. Mary's Hospital, supra,* the Board was dealing with the privileges of employees, given the clear language of the Act, and as the parties agreed, the same analysis applies equally to both employers and unions. Accordingly, what is frozen by this subsection includes the reasonable expectations of all three entities or persons, with respect to the ongoing relationship between an employer, a union and the employees, based on their established, and well entrenched, conduct.

Was This Bargaining Unit Work?

15. As noted above, the bargaining unit of the prior (Local 27) Collective Agreement, and therefore the bargaining unit for which Local 51 was certified, does not cover all low rise residential construction. Local 51's bargaining unit was described by the Board as follows in its decision of April 14, 2009:

> all employees (workers) of Trudel & Sons Roofing Ltd. who perform the work described in the clarity note below, as well as the metalmen who perform the work described in the clarity note below, excluding non-working foremen, hourly service men, flat roofers, aluminum/vinyl applicators, persons engaged in re-roofing, office, warehouse/shop workers, clerical workers and persons above the rank of foreman, engaged in the application of shingles and other roofing materials in new subdivision work (three or more units) in residential low-rise buildings (defined as non-elevated housing of not more than four (4) stories in height excluding basement) in the Province of

> Ontario, save and except the industrial, commercial and institutional sector. For additional clarity custom homes are excluded.
>
> Clarity Note:
>
> The word "Worker(s)" shall mean those persons who install asphalt shingles, louvers (roof vents), eave protection (including drip edge), step flashing, dormer flashing (under siding outside of O.L.R.B. Board Area 8 only), valleys (metal or asphalt) and ice and water shield corner pans ("shinglers") or who apply counter-flashing, dormer flashing, skylights, chimney pans and bay windows ("metalmen") who are remunerated on a piecework basis.

16. The wording used by the Board to describe this bargaining unit is taken directly from Articles 2.01 and 2.02 (which are the recognition clauses) of the prior Collective Agreement.

17. Trudel asserts that as these three cottages are all individually owned, and/or as they are all *custom homes* within the meaning of the bargaining unit description/recognition clause, the roofing work which Mr. Hayes performed on them was not *new subdivision work* and was, therefore, not covered by the terms of the prior Collective Agreement. In response, Local 51 asserts that the fact that each of these three cottages may have been owned by a different member of the Bratty family, and/or that the design of, and therefore the work to be done on, each one of them was unique, does not mean that these three cottages, on three adjacent lots on the same road, do not constitute a subdivision such that they fall within the scope of the Collective Agreement. For the reasons set out below, I do not find it necessary to definitively decide this question although the Company's position appears to me to be more reasonable and I will assume it to be correct for the purposes of this decision.

The Context of This Industry

18. In order to understand and appreciate the rights, duties and privileges which this particular situation involves it is necessary to consider the overall context of work relationships within this industry. The overwhelming majority of roofing work for new houses in the area surrounding Toronto is performed by crews employed or engaged by main contractors, such as Trudel, and who are compensated on a piecework basis. The individuals who make-up these crews may be independent contractors, dependent contractors or direct employees of the main contractors whose work they perform. The particular status of any particular individual worker or crew can change frequently.

19. Given the flexible and fluctuating relationships which exist in this industry, what is vital to these parties is that the working conditions, and in particular the piecework rates, are the same for all roofers regardless of whether they are independent or dependent contractors or direct employees of main contractors or of piecework crew leaders. From the employers' (and indeed the unions') perspective, it is in this way that the *level playing field* which provides vital stability in the construction industry can be maintained. Conversely, from the roofers' (and unions') perspective, this is the only way of insuring standard terms and conditions for the work which they perform. Therefore, and as these parties are both well aware, the collective agreements and the overall work relationships between the main contractors, workers and unions (including both Local 27, and more

recently Local 51) are specifically designed to make sure that each crew is paid the same amount, and on the same basis, for the same work regardless of the legal status of the members of a crew *vis-à-vis* the main contractor which assigned them the work.

Mr. Hayes' Status

20. Based on the size of his crew (normally 5 to 6 men) and the fact that his crew often works on more than one house at the same time (therefore allowing him, potentially at least, to profit from the labour done by others on houses he may not have worked on himself), it would appear that Mr. Hayes is, as asserted by Trudel, an independent contractor and he is, therefore, not an employee of Trudel, under the Act. However, based on my comments set out above, I also find that, as asserted by the Union, Mr. Hayes' actual legal status *vis-à-vis* Trudel is simply not relevant to my ultimate decision in this matter. Even if Mr. Hayes is not an employee of Trudel, the clear expectations of both the Union and Trudel, based on the past conduct of all of the various entities that have been involved in labour relations in this industry, is that he is to be treated, at least with respect to rates, in exactly the same manner as a direct employee or a dependent contractor. If this was not the case then the single most important principle upon which labour relations and collective bargaining in this industry is (and has been) based would be destroyed. Therefore, one of the privileges that both the Union and Trudel have here, and which is frozen, is that, even if he is an independent contractor, the financial terms of Mr. Hayes' relationship with Trudel must be exactly the same as those of Trudel's employees.

The Expectations of the Parties in These Circumstances

21. Based on the evidence, there was no real dispute that the crews that are regularly employed and/or engaged by Trudel to do the roofing work which is covered by the Collective Agreement, including Mr. Hayes and his men, do, on occasions, perform work beyond the actual scope of the Collective Agreement. When they do so, the strict terms of the Collective Agreement do not apply to such work as of right. However, given the clear past conduct of these parties (and in fact of the unionized portion of this industry as a whole), all concerned have very definite and certain expectation concerning the performance of such special work regardless of whether it is performed by independent or dependent contractors or direct employees. In that sense, non-collective agreement work gives rise to a series of *privileges* even though it may not involve any actual *rights* given that it is work which falls outside the scope of the Collective Agreement.

22. The practice of these parties is that, before any crew is assigned to perform work not covered by the Collective Agreement, Trudel and the crew leader reach an agreement about the amounts to be paid. In such circumstances relative bargaining power may vary but, in theory at least, the crew leader has the right to negotiate (or at the very least to know) the price that Trudel is willing to pay before he starts the work. In this way the crew leader (and possibly his entire crew) can decide whether the crew should do the special work being offered or if they should simply remain performing Collective Agreement work at the normal set rates (or, if such work is in short supply, if they should stay home or go to work for another main contractor). This is a privilege that the roofers that work for Trudel, under the Collective Agreement, have obtained as a result of past conduct and it can, therefore, be relied upon by them and their Union during the freeze period. Accordingly, this practice has established a corresponding duty which Trudel must continue to abide by during this same time period.

23. Assuming then (without definitively determining) that the work on these three cottages is outside of the scope of the Union's bargaining unit, Trudel would clearly have the right and/or the privilege to ask one of its crew leaders to perform such work for rates other than those set out in the Collective Agreement. However, if so asked, Mr. Hayes, like every other crew leader, has the privilege of knowing that Trudel views the work being offered as falling outside of the Collective Agreement, along with the privilege of negotiating the rates, and thereby knowing what he and his crew will be paid, before they actually do the work. How else would Mr. Trudel know if he wishes to do the work being offered or if he wishes to simply concentrate all of his efforts on his regular, Collective Agreement, work (which his book-in sheets clearly establish he was also performing during the last weeks of April and the first weeks of May, 2009)? This is in fact precisely what Richard Trudel thought had occurred but did not actually happen because the foreman failed to mention, to Mr. Hayes, the special rate that Mr. Trudel wanted to establish for the ice and water shield installation on these cottages. Accordingly, it appears that even the Company recognized that if the Collective Agreement rates were not to be paid this should have been agreed to first rather than simply unilaterally setting a rate after the work had been done.

24. In these circumstances then, where roofers were assigned to perform work, which they were not advised the Collective Agreement did not apply to and for which no special rates had been negotiated, the reasonable expectation of those roofers and the Union that represents them, along with the corresponding duty upon the Company, was that Trudel would be paying the Collective Agreement rates for such work. Further, these reasonable expectations would have been reinforced by the fact that Trudel actually paid the Collective Agreement rates for the work on the first cottage. Accordingly, for Trudel unilaterally to pay some other rate to Mr. Hayes after the work had been completed, when it had the chance to but had failed to establish a special rate before the work started, represents the removal of a privilege that these roofers (and their Union) have as a result of past conduct and which is therefore preserved by the provisions of section 86(1) during the freeze period.

25. Exactly the same logic applies to Trudel's alternative argument concerning the inapplicability of the Collective Agreement rates when the ice and water shield is installed on the entire roof deck. If that was the Company's position then the reasonable expectations of all of the parties, and Trudel's corresponding duty, would have been to make this position (that Mr. Hayes was to perform work for which there was no Collective Agreement rate) clear before the work actually started. If this was not so, how could the Union and Mr. Hayes have been expected to know that some other, unspecified, rate was suppose to apply, given that: the Collective Agreement does not specifically state that the listed rates are only for edge installation work; there was no practice (because it rarely occurs) of setting at different rate if the whole roof is to be covered; and, the first book-in sheet was paid in full? In these circumstances, then, the reasonable expectations of the parties must have been that the Collective Agreement rates were applicable and, as such, the application of those rates is a benefit upon which Mr. Hayes and the Union are entitled to rely during the freeze period.

Conclusion

26. For the reasons set out above, I find that Trudel violated section 86 of the Act when it failed to pay Mr. Hayes the full amount set out on his book-in sheet for the ice and water shield installation work performed on lots 2 and 3 and therefore, direct Trudel, forthwith, to pay to the Union (in trust for Mr. Hayes and the applicable members of his crew) the sum of $3,953.00.

COURT PROCEEDINGS

3737-05-G (Court of Appeal No. C49737) Jacobs Catalytic Ltd. –and– International Brotherhood of Electrical Workers, Local 353, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, General Presidents' Maintenance Committee for Canada and the Ontario Labour Relations Board

Construction Industry Grievance – Judicial Review – Natural Justice – The Board found that fire restoration work, performed by IBEW members, was regulated under the Provincial Agreement, rather than the GPMA, since the work was repair rather than maintenance – The Board also found that estoppel did not apply – At the request of the Union, the successful party, the Board issued further reasons – Divisional Court found the Board had the jurisdiction to issue supplementary reasons, and a majority of the panel found the supplementary reasons to be sufficient and dismissed the application [see [2008] OLRB Rep. May/June 466] – On appeal, in concurring judgements, the Court of Appeal found the issuance of supplementary reasons in these circumstances to be a breach of procedural fairness – Epstein and Blair, JJ.A. found the Board had the power to reconsider the merits of its decision, but that there was no statutory provision giving the Board the power to issue supplementary reasons designed to repair deficiencies in an earlier set of reasons – They found the doctrine of functus officio applied in these circumstances and that the Board's actions created unfairness – Simmons, J.A. found the question was not one of jurisdiction as the absence of specific statutory authority did not preclude the Board from delivering supplementary reasons and that the functus officio doctrine did not deprive the Board of jurisdiction – The question was one of fairness and should be determined by using the principles set out in Teskey – Simmons, J.A. found that several features of this case were sufficient to demonstrate that a reasonable person would believe that the Board's supplementary reasons reflect after-the-fact result driven reasons rather than a true reflection of the reasoning process that led to the decision – Given that the first set of reasons was inadequate, and the delivery of the second set was unfair, the Appeal was allowed and matter remitted to a differently constituted panel of the Board

Court of Appeal for Ontario, Simmons, Blair and Epstein JJ.A., October 29, 2009

Epstein J.A.:

I. INTRODUCTION

[1] This appeal raises the issue of the jurisdiction of the Ontario Labour Relations Board to amend its reasons.

[2] On January 7, 2006, a fire caused extensive damage to a Petro-Canada plant. A dispute arose over the characterization of the nature of the work required to repair the plant.

[3] The dispute came before the Ontario Labour Relations Board by way of a grievance under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A (the "*LRA*"). After a lengthy hearing, the Board rendered a two-page decision (the "first set of reasons"). Shortly thereafter, counsel for the successful party, the respondent, the International Brotherhood of Electrical Workers, (the "IBEW"), asked the Board to provide "fuller reasons for its decision". This request was resisted by the

unsuccessful party, Jacobs Catalytic Inc., on the basis that the Board lacked jurisdiction to render supplementary reasons. Notwithstanding this objection, the Board released a redrafted decision (the "second set of reasons").

[4] Jacobs' application to the Divisional Court for judicial review, on grounds that included a challenge to the Board's jurisdiction to issue the second set of reasons, was dismissed by a majority.

[5] In Jacob's appeal to this court, a preliminary issue has been raised concerning the Board's jurisdiction to issue supplementary reasons. This issue is particularly important to the determination of this appeal as the parties agree that the Board's first set of reasons are inadequate. Accordingly, if the Board lacked jurisdiction to render the second set of reasons, Jacobs has been denied procedural fairness and the appeal must be allowed.

[6] In my view, the Divisional Court erred in finding that the Board had jurisdiction to issue the second set of reasons. Accordingly, for the reasons that follow, I would allow the appeal and send the matter back for a new hearing before a differently constituted Board.

II. BACKGROUND FACTS

[7] The facts leading up to the hearing before the Board are only relevant to put the issues surrounding the Board's reasons in some context. I will therefore summarize them but briefly.

[8] Jacobs and the IBEW are bound by two collective agreements: a project agreement for maintenance, by contract in Canada applicable to the Petro-Canada site (the "GPMA"), and the principal agreement.

[9] The GPMA is between Jacobs and the General Presidents' Maintenance Committee for Canada (the "GPMC"), a council of 13 building trade unions. The GPMC negotiates and administers GPMAs across Canada that bind both large maintenance contractors, such as Jacobs, and the 13 unions including the IBEW, to a set of terms and conditions for the performance of maintenance work by union members.

[10] The principal agreement is a "provincial agreement" as defined in s. 151(1) of the *LRA*, between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (the "ETBA") and the IBEW.

[11] A significant difference between the two collective agreements is that the GPMA provides for wage rates of $1.00 per hour less than the principal agreement, overtime after 40 hours per week rather than 37.5 hours per week and no interruption of work during a provincial construction strike.

[12] Jacobs took the position that the fire restoration work is maintenance work, properly falling under the GPMA. The IBEW grieved, claiming that Jacobs should have applied the principal agreement to the work in question on the basis that under the *LRA*, the work is construction work. The grievance was referred to the Board for arbitration pursuant to s. 133 of the *LRA*. The Board granted the GPMC and the ETBA intervener status.

[13] The Board heard evidence over 6 days from 9 witnesses and received written and oral submissions before reserving its decision.

[14] In its first set of reasons, two pages in length and released on November 15, 2006, the Board dealt with two issues: whether the work in question was maintenance or construction within the meaning of the *LRA*; and, if construction, whether the doctrine of estoppel should apply.

[15] The Board upheld the grievance, concluding that the work was within the definition of construction work under the *LRA*, that the doctrine of estoppel could not override the applicable collective agreement and that, as a result, Jacobs had violated the principal agreement and was liable for damages.

[16] In a letter dated December 1, 2006, counsel for the IBEW asked the Board to provide "fuller reasons for its decision". Jacobs objected on the ground that the Board lacked jurisdiction to redraft its reasons.

[17] On February 1, 2007, the Board provided the second set of reasons - two and a half pages in length - in which six paragraphs were added to the first set of reasons. In these reasons, the Board said that it had jurisdiction to expand upon its reasons. It gave no authority in support of this position.

III. STATUTORY FRAMEWORK

[18] The jurisdiction of a statutory tribunal such as the Board is entirely circumscribed by statute: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 (CanLII), [2006] 1 S.C.R. 513, at paras. 16, 27 and 47. It follows that the statutory framework of the Board's enabling statute, the *LRA*, governs the Board's jurisdiction to issue further reasons.

[19] The relevant provision of the *LRA* states:

> 114(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

[20] The Board's *Rules of Procedure* set out the process for making a request for reconsideration pursuant to s. 114(1); the required steps include completing the prescribed forms and filing complete written submissions with the Board within the prescribed time period.

[21] Furthermore, the Board has adopted the following principles by which it is guided in determining whether to grant a reconsideration request. The General Guidelines contained in the Ontario Labour Relations Board's Information Bulletin No. 19 read as follows:

> Generally, the Board will not reconsider its decision unless the requesting party has new evidence that would be practically conclusive of the case and *that it could not have reasonably obtained earlier*, or the party has *new* objections or arguments *that it had no opportunity to raise earlier*. Because of the need for finality in labour relations matters, the Board does not treat its reconsideration power as either a tool for a party to repair the deficiency of its case nor as an opportunity to reargue it. (See *John Entwistle Construction Limited*, [1979]

> OLRB Rep. Nov. 1096.) If the requesting party relies on matters that could reasonably have been raised at the original hearing, the Board will normally not reconsider its decision [emphasis in original].

IV. THE DECISION BELOW

[22] In reasons dated June 4, 2008, the Divisional Court dismissed Jacob's application for judicial review.

[23] The Divisional Court found the first set of reasons inadequate but held, at para. 48, that s. 114(1) of the *LRA* permits the Board to issue supplemental reasons, stating that the provision "is framed broadly, so as to ensure that the Board is not *functus* once it has issued a decision." The Divisional Court relied on *Re Canac Shock Absorbers Ltd. and International Union, United Automobile, Aerospace & Agricultural Workers of America (U.A.W.), Local 984* (1975), 5 O.R. (2d) 648, as support for the Board's power to vary or clarify a decision. It also noted that in *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers* 2007 CanLII 65617 (ON S.C.D.C.), (2007), 86 O.R. (3d) 508 (Div.Ct.) ("*IBEW 1739*"), the Divisional Court was critical of an applicant in a judicial review application who attacked the adequacy of the Board's reasons without first asking the Board for further reasons or asking for a reconsideration pursuant to s. 114(1) of the *LRA*. The Divisional Court acknowledged, however, that the Board in *IBEW 1739* had specifically reserved the power to issue further reasons.

[24] Finally, at para. 50, the Divisional Court also provided a policy rationale in support of its decision, stating:

> From a policy perspective, it makes sense to permit the Board to issue supplemental reasons in a case like this, as the provision of such reasons may be sufficient to avoid the costs and delay associated with an application for judicial review. Here, the application for judicial review had not yet been launched at the time the Second Reasons were issued, and there is no apparent prejudice to the unsuccessful party because of the issuance of these reasons.

[25] The majority went on to find the second set of reasons to be adequate and, after rejecting the other grounds upon which Jacobs relied, dismissed the application. While Smith J. dissented in the result, he did agree that the Board had jurisdiction to issue supplemental reasons pursuant to s. 114(1) of the *LRA*.

V. ISSUES

[26] In this appeal, Jacobs raises the following issues.

1. Whether the Divisional Court erred in determining that the Board, in these circumstances, was entitled to issue supplementary reasons at the request of the successful party.

2. Whether the majority of the Divisional Court erred in finding that the second set of reasons was adequate.

3. Whether the Divisional Court erred in its determination of the standard of review with respect to the Board's application of the doctrine of estoppel.

4. Whether the majority of the Divisional Court erred in determining that the Board's application of the doctrine of estoppel was reasonable.

[27] Given my conclusion that the Board did not have jurisdiction to issue the second set of reasons and the parties' agreement that in such case the appeal ought to be allowed, it is only necessary for me to address the first issue.

VI. ANALYSIS

[28] As a preliminary matter, I start with the Board's duty to provide reasons.

[29] In *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817 the Supreme Court established that in certain circumstances the duty of procedural fairness will include a requirement that an administrative tribunal provide reasons for its decision.

[30] In this court's recent decision, *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670 (CanLII), Goudge J.A. referred to *Baker* in explaining the process whereby the content of the duty of procedural fairness may be determined, including the obligation, if any, to give reasons. At para. 20 he said:

> ...While acknowledging there may be other factors, *Baker* suggests five factors of relevance to determine the content of the duty of fairness: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme being administered; the importance of the decision to the affected individual; the legitimate expectations of the person challenging the decision; and respect for the choice of procedures made by the administrative agency itself.

[31] In this case, the decision determined significant rights of the parties and there is a right to have the decision reviewed. Furthermore, the process used was very much like a court process. The Board, like the courts, has a body of jurisprudence, regularly refers back to its own decisions and has its own official reporter series. In my view, it is therefore within the parties' reasonable expectations that they will receive reasons. These observations support the conclusion that the Board is obliged to provide reasons.

[32] But what of the Board's jurisdiction to revisit its reasons? This question introduces the concept of *functus officio*. Guidance on the application of *functus* to administrative tribunals can be found in *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (S.C.C.), [1989] 2 S.C.R. 848, where Sopinka J. said at p. 861 that:

> As a general rule, once [an administrative tribunal] has reached a final decision in respect of a matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, 1934 CanLII 1 (S.C.C.), [1934] S.C.R. 186.

[33] Beyond clerical or mathematical errors, or an error in expressing the tribunal's intention, *functus officio* generally applies except where varied by statute. There is no suggestion in this case of a slip or error. Therefore the Board's jurisdiction to revisit its reasons must be through the authorization of the *LRA*.

[34] Both the IBEW and the Board, in arguing that the Board had jurisdiction to render the second set of reasons, rely, in various ways, on the interpretation they say should be given to s. 114(1) of the *LRA*, policy considerations and certain jurisprudence.

1. Statutory Construction

[35] Clearly, s. 114(1), the section that deals directly with the Board's authority to revisit reasons, is the governing provision. The Board points out that the section does not mention "reasons" specifically, but rather refers to "decisions, orders, directions, declarations, or rulings" and argues that the power to vary a decision must include the power to vary or supplement its reasons. The term "decisions" in s. 114(1) must include the reasons for the decision.

[36] As discussed, I agree with this point but it takes me to a different conclusion.

[37] According to the modern principles of statutory interpretation, "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Elmer A. Driedger, *The Construction of Statutes*, (Toronto: Butterworths, 1974), at p. 67; *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27, at para. 21.

[38] As previously indicated, the *Baker* analysis leads me to conclude that reasons must accompany every Board decision. In other words, the Board's decisions must be reasoned decisions.

[39] Principles of statutory interpretation support the conclusion that in s. 114(1) the word "decision" must include "reasons". The *LRA*, periodically refers to the filing of a decision "exclusive of the reasons therefor": *LRA*, s. 48(19). See also *LRA* ss. 96(6), 99(10), 102, 144(4), and 168(8). This suggests that in all other sections where the word "decision" appears alone, it must be intended to include the reasons behind the decision. It is a principle of interpretation that "[u]nless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act:" *Thomson v. Canada (Deputy Minister of Agriculture)*, 1992 CanLII 121 (S.C.C.), [1992] 1 S.C.R.385 at 400 (per Cory J., for the majority). As a matter of interpretation, I conclude that an unqualified reference to a "decision" in the *LRA*, as in s. 114(1), includes the "reasons therefor".

[40] I therefore, in agreement with the submissions of the Board, start from the position that in the context of s. 114(1) of the *LRA*, the term decision means the decision and its reasons.

[41] However, the Board and I part company on the consequences of this conclusion in terms of jurisdiction to revisit reasons in the absence of a request to reconsider the decision itself.

[42] The words of s. 114(1), read "in their grammatical and ordinary sense", do not countenance the possibility that the Board has jurisdiction to issue supplementary reasons in circumstances where the decision is not in play. The relevant portion states that "the Board may at any time, if it considers it advisable to do so, *reconsider* any decision, order, direction, declaration or ruling made by it *and*

vary or revoke any such decision, order, direction, declaration or ruling". This section does not mention the power to augment reasons, expand upon reasons, or issue supplementary reasons. Rather, the use of the conjunctive "and" indicates that any decision by the Board to "vary or revoke" one of its decisions will be as a result of its first having *reconsidered* the decision.

[43] According to the *Canadian Oxford Dictionary*, 2nd ed., "reconsider" means "consider again, [especially] for a possible change of decision." In plain language, it means putting the result in play.

[44] Here, the IBEW did not ask the Board to reconsider its decision; indeed, a request for reconsideration emanating from the IBEW would be more than passing strange since it was successful before the Board.

2. Policy Considerations

[45] The same conclusion is reached by considering the policy behind s. 114(1).

[46] Section 2 of the *LRA* sets out the objects of the *LRA*. It reads:

> 2. The following are the purposes of the Act:
>
> 1. To facilitate collective bargaining between employers and trade unions that is the freely-designated representatives of the employees.
> 2. To recognize the importance of workplace parties adapting to change.
> 3. To promote flexibility, productivity and employee involvement in the workplace.
> 4. To encourage communication between employers and employees in the workplace.
> 5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
> 6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
> 7. To promote the expeditious resolution of workplace disputes.

[47] Section 114(1) seems designed to achieve the last of these objects; namely, to promote the expeditious resolution of workplace disputes. This particular objective stems from the nature of the relationship between the parties: unions and employers must be able to continue to work together despite any disputes that may arise: see *IBEW 1739* at paras. 15-17.

[48] A common argument in favour of allowing an agency to reconsider its decision is that it is more time and cost effective to allow a tribunal to correct its own error rather than wait for a court to order it to correct the error following a judicial review: Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf, vol. 3 (Toronto: Thomson Canada Limited, 2004), at p. 27A-2. As previously mentioned, the Divisional Court relied upon this policy rationale in its reasons supporting the Board's actions.

[49] This argument is convincing insofar as it provides normative support for a tribunal's reconsideration power. However, I am not persuaded by this rationale in the circumstances here where the Board has issued reasons that are *prima facie* final and the successful party has requested that the Board augment those reasons. Allowing the Board to provide "fuller" reasons does not promote efficiency and timeliness; rather, it does the opposite. When a tribunal does not announce that further reasons are to come, it is fair for the parties to assume that the reasons issued are final and

to arrange their affairs accordingly, including deciding whether and on what grounds to seek judicial review. Leaving a decision open to supplementary reasons invites the unnecessary consumption of resources and avoids finality - consequences that are hardly consistent with the objective of the expeditious resolution of workplace disputes.

[50] Furthermore, supplementary reasons run the risk of giving the appearance of the Board's attempting to "cooper up" the decision: see Donald J.M. Brown, *Civil Appeals*, vol. 2, looseleaf (Toronto: Canvasback Publishing, 2009), at pp. 13-31 to 13-32; see also *Kowalski v. Royal Ford Lincoln Mercury Sales Ltd. (c.o.b. Royal Ford Lincoln Mercury)* reflex, (1993), 116 Sask. R. 73, at para. 14.

[51] The consequences of such a perception have been considered in *R. v. Teskey*, 2007 SCC 25 (CanLII), [2007] 2 S.C.R. 267, at para. 18 where the majority held that:

> Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it.... Further, if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.

[52] While *Teskey* is a criminal case, the rationale applies here. When an adjudicator purports to issue the final reasons for a decision and later issues supplementary reasons, without explaining why the supplementary reasons did not form part of the initial reasons, a reasonable person may apprehend that the adjudicator engaged in results-based reasoning in order to shore up the decision. If the adjudicator had relied on the content of the supplementary reasons in arriving at the decision, those reasons should have formed part of the first set of reasons.

[53] Finally, and in my view, significantly, interpreting the *LRA* so as to prevent the provision of revised reasons in these circumstances encourages focused decision-making that is clearly and fully explained at the outset.

3. Jurisprudence relating to *functus officio*

[54] In my view, the jurisprudence upon which the IBEW relies to overcome the application of *functus* does not support its arguments.

[55] Both the Divisional Court and the IBEW cite *Re Canac Shock Absorbers* and *IBEW 1739* as supporting the conclusion that the Board has the power to provide supplementary, clarifying reasons despite the doctrine of *functus officio*.

[56] In *Re Canac Shock Absorbers*, the Board initially decided that the two corporate entities in question must be treated as one employer for the purposes of the *LRA*. The parties disagreed about the effect of this decision. The union applied to the Board, requesting clarification. After hearing submissions from the parties on the issue, the Board agreed to clarify the decision pursuant to its

powers under then section 95(1) of the *LRA*, which is identical to the current s. 114(1). Although the traditional prerequisites for the Board to exercise its reconsideration power were not met, the Board granted the request for two reasons. First, the proceedings had already been protracted, and it would be preferable to avoid the multiplicity of proceedings that would result from attempting to implement the decision in accordance with the union's interpretation. Second, at the time, the issue was a "matter of virtually first instance" and as a result there was a dearth of precedent to guide any tribunal that might be required to interpret the Board's decision. As a clarification, the Board added one sentence to its reasons, explaining the effect of its decision.

[57] The Divisional Court concluded that regardless of whether the Board's alteration was a variation or a clarification, the Board did not exceed its jurisdiction, since s. 91(12) (now s. 110(16)) gives the Board the power to determine its own practice and procedure.

[58] In my view, the clarification of the decision in *Re Canac Shock Absorbers* resulted from ambiguity, not insufficiency. Macaulay and Sprague treat ambiguities and clarifications as inseparable from the common law exception to *functus* of "clerical error, accidental slip or omission" on the grounds that "one assumes that the decision-maker did not want to be ambiguous": p. 27A-34.

[59] In *IBEW 1739* the Divisional Court was critical of an applicant in a judicial review application who attacked the adequacy of the Board's reasons without first asking the Board for further reasons or asking for a reconsideration pursuant to s. 114(1). In that case, the Board had issued brief written reasons and stated that further reasons might follow. The Vice Chair also noted that he "remained seized to deal with any difficulties in implementing this award": para. 33. The union then sought judicial review on the basis of, among other things, insufficiency of reasons. The Divisional Court noted that in the interests of achieving its labour relations objectives, the Board is often required to give "bottom line" decisions and to release reasons quickly after expedited proceedings. The court also noted that "where one of the parties is unsatisfied with either the result or the reasoning, it has a legislated right to ask for reconsideration as expressly contemplated in s. 114(1) of the Act."

[60] The decision in *IBEW 1739* is of no assistance for the simple reason that in the instant case the Board did not remain seized to give further reasons. When an arbitrator or tribunal remains seized of an issue, the doctrine of *functus officio*, by definition, does not apply. *Black's Law Dictionary*, 7th ed., defines "functus officio" as being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished". Retaining jurisdiction over an aspect of a case is generally acceptable only where that aspect has not been fully addressed; a tribunal cannot arbitrarily reserve for itself extended jurisdiction over a completed aspect of a case. It is important to note that the inquiry as to when a tribunal has completed its commission must be contextual: "[t]he nature of the mandate of an agency is important in determining whether an agency has the authority to reserve jurisdiction on a matter in issuing a decision:" Macaulay and Sprague, at p. 27A-36.

[61] In *IBEW 1739*, the immediate need for a resolution necessitated an expedited procedure and prompted the Vice-Chair to reserve jurisdiction to provide fuller reasons in the future. In this case, jurisdiction to revisit the reasons was neither reserved nor warranted.

[62] While, in my view, *Re Canac Shock Absorbers* and *IBEW 1739* can be distinguished on these grounds, I would add that to the extent that they can be interpreted as standing for the

proposition that the Board's jurisdiction to determine its own practice and procedure is expansive enough to allow it to clarify previous decisions, they were wrongly decided. The power to control a tribunal's own procedure does not extend to post-judgment jurisdiction. Indeed, the Divisional Court, in *Borough of Etobicoke v. Etobicoke Professional Firefighters Association Local 1137 et. al.* (1982), 37 O.R. (2d) 212 (Div. Ct.) cautioned against labour arbitrators reserving to themselves powers that were not clearly provided for within the relevant statutory scheme.

[63] None of the other cases relied upon by the respondents are germane to the case at bar in that they do not touch on whether "reconsideration" is broad enough to include the power to revisit the reasons separate from the decision itself.

VII. CONCLUSION

[64] The text of s. 114(1) allows the Board to reconsider "any decision, order, direction, declaration or ruling". In my view, this means the Board has the power to reconsider the merits of its decision, upon receiving full submissions from the parties, in accordance with its *Rules of Procedure*. There is no provision in the *LRA* that gives the Board the power to do what it did in this instance, namely, issue supplementary reasons designed to repair deficiencies in an earlier set of reasons. If the Board was to have such jurisdiction, the statute would have made it clear. Therefore, the common law doctrine of *functus* applies.

[65] Moreover, I cannot accept that the Board has the power to rewrite its reasons in the absence of a reconsideration on any other basis. Such a conclusion would introduce an element of unfairness to the system.

[66] First, jurisdiction to re-write reasons in circumstances such as these would expose the losing party to new reasons without access to the procedural protections provided in the Board's *Rules of Procedure*.

[67] Second, it would create a problem of uncertainty. If the Board were to have ongoing authority to augment its reasons, the parties would never know when the reasons actually become final. After the second set of reasons? After the third?

[68] Third, it would allow for manipulation of the decision that is being judicially reviewed. If the reasons are inadequate, the parties will always be at odds over what reasons ought to be reviewed. The unsuccessful party will want them to remain unchanged so it can argue inadequate reasons on the judicial review. The successful party will seek to have the reasons rewritten.

[69] I return where I began – with the observation that the Board is a creature of statute. While tribunals may be entitled to exercise certain powers to fill in gaps left by the legislators that are necessary to fulfill their mandate, that is not what happened in this case. S. 114(1) specifically addresses the issue of further reasons. Its wording and clear parameters, together with the Board's *Rules of Procedure*, address the policy issues upon which the IBEW relies and provides fairness to all parties.

[70] Here, the IBEW did not seek further reasons under s. 114 (1) for obvious reasons. That section, as I have said, provides for a reconsideration, a process that brings the result into play – something a successful party such as the respondent is not likely to want. IBEW wanted the Board to

improve upon its reasons - favourable in the result but deficient in their content - to immunize them from review. That is neither provided for by the *LRA*, nor fair.

VIII. DISPOSITION

[71] As Jacobs has been denied procedural fairness, I would allow the appeal and remit that matter back for a new hearing before a differently constituted Board.

[72] Upon the agreement of the parties, the IBEW will pay Jacobs its costs of this appeal in the amount of $9,500.

Simmons J.A. (concurring):

I. Introduction

[73] I have had the benefit of reading the reasons of my colleague Epstein J.A. I agree with my colleague's conclusion that Jacobs Catalytic Ltd. was denied procedural fairness because of the failure of a panel of the Ontario Labour Relations Board to deliver adequate reasons. Accordingly, I too would allow the appeal and send the matter back for a new hearing before a differently constituted Board.

[74] However, I reach this conclusion for somewhat different reasons than my colleague, which I will try to explain briefly.

[75] Like my colleague, I would accept Jacobs' submission that the reconsideration power contained in s. 114 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, (*LRA*), does not give the Board express statutory authority to deliver supplementary reasons for a prior decision that has not been reconsidered.

[76] However, in my view, the absence of express statutory authority does not mean that the Board lacked jurisdiction to deliver supplementary reasons. As I see it, the Board's authority to deliver reasons, whether original or supplementary, is ancillary to its power to make decisions and determinations, and does not require explicit statutory authority.

[77] Further, I am not persuaded, for several reasons, that the *functus officio* doctrine deprived the Board of jurisdiction to deliver supplementary reasons. Rather than a jurisdictional issue, in my opinion, the question of whether the supplementary reasons should be considered on a judicial review application is a fairness issue and is governed by the principle set out in *R. v. Teskey*, 2007 SCC 25 (CanLII), [2007] 2 S.C.R. 267.

[78] Applying the *Teskey* principle, I conclude that the Board's supplementary reasons should not have been considered on the judicial review application and that a new hearing is required because of the inadequacy of the Board's first set of reasons.

II. Background

[79] I agree generally with my colleague's summary of the facts and with her description of the decision of the Divisional Court. Accordingly, I will refer to these matters only briefly to put my reasons in context.

[80] As my colleague has explained, the proceeding before the Board arose out of a grievance by the International Brotherhood of Electrical Workers concerning which of two collective agreements governed wage rates to be paid for fire restoration work performed at a Petro-Canada plant. Following a lengthy hearing, the Board issued a two-page decision on November 15, 2006 in which it upheld the union's grievance. Later, on February 1, 2007, and in response to a request from the union for more fulsome reasons, the Board delivered redrafted and somewhat amplified reasons consisting of about two-and-a-half pages in which it arrived at the same result.

[81] On an application for judicial review brought by the employer (Jacobs), the majority of the Divisional Court agreed that the Board's first set of reasons was inadequate but concluded that the supplementary reasons were adequate and dismissed the remaining grounds for judicial review. In doing so, the majority held that s. 114 of the *LRA* provided the Board with authority to issue supplementary reasons.

[82] On appeal, all parties agree that the Board's first set of reasons was inadequate. I, too, agree, essentially for the reasons expressed by the majority of the Divisional Court. However, in this court, Jacobs, supported by the General Presidents' Maintenance Committee, renews its preliminary objection that the Board lacked jurisdiction to issue supplementary reasons.

[83] In particular, Jacobs contends that the reconsideration provision contained in s. 114 of the *LRA* does not empower the Board to issue supplementary reasons where it has not reconsidered a prior decision and that, absent authority under that provision, the Board lacked jurisdiction to issue supplementary reasons because it was *functus*.

III. Discussion of Issues

(1) Interpretation of s. 114 of the *LRA* and the Board's Power to Deliver Reasons

[84] As I have said, I agree that the reconsideration power contained in s. 114 of the *LRA* does not provide the Board with express statutory authority to deliver supplementary reasons for a prior decision that has not been reconsidered.

[85] Section 114 of the *LRA* is an expansive provision that describes the Board's exclusive jurisdiction and the final nature of its decisions. In addition, it gives the Board broad statutory authority to reconsider its decisions. The reconsideration provision empowers the Board to "reconsider any decision" and to "vary or revoke any such decision":

> 114. (1) The Board has *exclusive jurisdiction* to exercise the powers conferred upon it by or under this Act and *to determine all questions of fact or law that arise* in any matter before it, and *the action or decision of the Board thereon is final* and conclusive for all purposes, *but nevertheless the Board may* at any time, if it considers it advisable to do so, *reconsider any decision*, order, direction, declaration or ruling made by it *and vary or revoke any such decision*, order, direction, declaration or ruling. [Emphasis added.]

[86] The reconsideration power contained in s. 114 makes no reference to issuing reasons, or supplementary reasons, for a decision made previously. On a plain reading of the provision, it applies only where the Board is asked, or is contemplating, changing a prior decision in some respect. As was noted by my colleague, the IBEW in this case specifically did not ask the Board to reconsider its decision. It was successful before the Board; why would it do so.

[87] However, in my view, the absence of express statutory authority to issue supplementary reasons does not mean the Board lacked jurisdiction to issue them.

[88] There was no express statutory authority for the Board to deliver its original reasons in this case; yet no one questions that the Board had jurisdiction to do so. Similarly, there is no express statutory authority for the Board to reserve the right to deliver supplementary reasons. Again, no one questions that it can do so.

[89] In my opinion, the power of a tribunal to give reasons, or supplementary reasons, is ancillary to its jurisdiction to give a decision. Moreover, in a labour relations matter such as this one, the power to give reasons is reinforced by the common law duty to give adequate reasons: see *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817; and *Via Rail Canada Inc. v. National Transportation Agency*, 2000 CanLII 16275 (F.C.A.), [2001] 2 F.C. 25.

[90] In the end, I see no basis for holding that express statutory authority is required to permit the delivery of supplementary reasons.

(2) Doctrine of *Functus Officio*

[91] The next question is whether the doctrine of *functus officio* applies so as to preclude the delivery of supplementary reasons in this case. In my view, it does not.

[92] It is helpful to begin the discussion of the *functus officio* doctrine with reference to the Supreme Court's decision in *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (S.C.C.), [1989] 2 S.C.R. 848, at p. 680, where Sopinka J. set out the essential elements of the doctrine as well as its exceptions:

> The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that *the power to rehear was transferred by the Judicature Acts to the appellate division.* The *rule applied only after the formal judgment had been drawn up, issued and entered*, and *was subject to two exceptions*:
>
> 1. where there had been *a slip in drawing it up*, and,
>
> 2. where *there was an error in expressing the manifest intention of the court.* See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, 1934 CanLII 1 (S.C.C.), [1934] S.C.R. 186. [Emphasis added.]

[93] However, at least three questions arise from this statement of the rule. First, given that the rule arose in civil cases, at what point does the presiding officer become *functus* in other types of

cases?[1] Second, does the rule apply to reasons for decision as well as to decisions? Third, what is covered by the two exceptions?[2]

[94] No doubt because of the need to address the substantive issues on appeal, the parties did not address these questions in any detail. In my view, the answers to the first and second of these questions are particularly important to this appeal.

[95] *Chandler* provides assistance with both questions. After explaining the general rule and its exceptions, Sopinka J. discussed the application of *functus officio* in the administrative law context at pp. 860-61. Although what follows below are some rather lengthy quotations, in my view, they are significant because they make three important points.

[96] First, provisions such as s. 114 of the *LRA* are designed to avoid the application of the *functus officio* doctrine where the legislature deems that appropriate in the context of the work of the particular administrative tribunal:

> In *Grillas v. Minister of Manpower and Immigration*, 1971 CanLII 3 (S.C.C.), [1972] S.C.R. 577, Martland J. speaking for himself and Laskin J. *opined that the same reasoning did not apply to the Immigration Appeal Board from which there was no appeal except on a question of law....*:
>
> > *The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.*
> >
> > In *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, the Appellate Division of the Supreme Court of Alberta *was of the view that the Alberta Legislature had recognized the application of the restriction stated in the St. Nazaire Company case to administrative boards in that express provision for rehearing was made in the statutes* creating some provincial boards, whereas, *in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.* [Emphasis added.]

[97] Second, the mischief at which the *functus officio* doctrine is primarily directed is the subsequent reconsideration of a decision that has already been made. Sopinka J. explained this in a passage immediately following the quotation set out above:

> I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. *As a general rule, once such a tribunal has reached a final decision* in respect to the matter that is before it in accordance with its enabling statute *that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change*

> *of circumstances. It can only do so if authorized by statute or if* there has been a slip or error within the exceptions enunciated in the *Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra.* [Emphasis added.]

[98] Third, in relation to administrative tribunals, the *functus officio* doctrine should be applied in a flexible way:

> To this extent, the principle of *functus officio* applies. It is *based, however, on the policy ground which favours finality* of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason, I am of the opinion that *its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law.* Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, *the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation...*
>
> Furthermore, *if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task.* If, however, the administrative entity is allowed to dispose of a matter by one or more specified remedies or by alternative remedies, the fact one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. [Emphasis added.]

[99] In my opinion, the quotations from *Chandler*, suggest that the finality concerns that underlie the *functus officio* doctrine do not support restricting a tribunal from issuing supplementary reasons, at least where the tribunal has a reconsideration power.

[100] In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, at para. 79, Iacobucci and Arbour JJ. highlighted the importance of the *functus officio* doctrine in promoting finality of judgments in order to set the stage for appeals:

> It is clear that the principle of functus officio exists to allow finality of judgments from courts which are subject to appeal (see also Reekie v. Messervey, 1990 CanLII 158 (S.C.C.), [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense: *if the court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal.* [Emphasis added.]

[101] However, where the Legislature has seen fit to give an administrative tribunal a reconsideration power, the existence of that power signals that other considerations trump the importance of finality in relation to the work of the tribunal.

[102] Moreover, as was explained by the majority of the Divisional Court at para. 50 of their reasons, concerns about efficiency and expense justify permitting the Board to deliver supplementary reasons where there is no prejudice to the parties:

> From a policy perspective, it makes sense to permit the Board to issue supplemental reasons in a case like this, as the provision of such reasons may be sufficient to avoid the costs and delay associated with an application for judicial review.

[103] Although it is undoubtedly generally desirable that reasons be given before an appeal or application for judicial review is launched, unlike the absence of a decision, neither the absence of reasons nor the delivery of supplementary reasons create insurmountable problems to rights of appeal or judicial review. If that were not so, courts and tribunals would not have the power to reserve the right to deliver reasons at the time of giving a decision.

[104] In that regard, it is clear that the *functus officio* doctrine does not restrict the right to reserve the power to give reasons, or further reasons, after a decision is rendered and an appeal is launched: see *R. v. Teskey*, 2007 SCC 25 (CanLII), [2007] 2 S.C.R. 267.

[105] In *Teskey*, the trial judge reserved the right to give written reasons after finding the accused guilty. Although Charron J., speaking for the majority, held that the written reasons should not be considered on appeal in the particular circumstances of that case, she acknowledged that it was sometimes necessary for a court to deliver reasons for a decision after the decision was made and did not question the power of a court to reserve the right to do so. I see no reason why this principle should not apply to an administrative tribunal such as the Board.

[106] If the *functus officio* doctrine does not restrict the right to reserve the power to give reasons after a decision is rendered and even after an appeal is launched, I fail to see what policy considerations justify interpreting the doctrine to deprive a tribunal that has a reconsideration power of jurisdiction to issue supplementary reasons just because the tribunal did not explicitly reserve the right to do so.

[107] Significantly, the result in *Teskey* makes it clear that appellate courts are well-positioned to guard against the risks associated with after-the-fact reasons without the need to apply the *functus officio* doctrine.

[108] In my opinion, the *Teskey* principle is a preferable tool for assessing whether supplementary reasons should be considered on judicial review as compared to the blunt instrument of a bright-line application of the *functus officio* doctrine.

[109] Turning to the quotation from *Chandler* set out at paragraph 25, I note that Sopinka J.'s comments are directed at the issue of reconsideration, they do not address the delivery of reasons or supplementary reasons. Accordingly, I question whether the *functus officio* doctrine even applies to supplementary reasons.

[110] In this regard, it is important to remember that, just as there is a distinction between a court's reasons for judgment and its judgment, there is a distinction between a tribunal's decision and its reasons for decision.

[111] In my view, s. 17(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, makes it clear that there is a distinction between a decision and the reasons for a decision in an administrative law context. More importantly, s. 17(1) demonstrates that the *functus officio* doctrine may not be in play.

[112] Section 17(1) of the *SPPA* requires that "[a] tribunal ... give its final decision ... in writing"; and also that the tribunal "give reasons in writing therefor if requested by a party."

[113] On a plain reading of s. 17, there is a distinction between the decision of a tribunal and the tribunal's reasons for its decision. Accordingly, even if it is the practice of the Board to issue its decision or order and its reasons for the decision in the same document, it is necessary and important to distinguish between the two.

[114] Significantly, although a party may obviously request reasons in advance, s. 17(1) appears to contemplate reasons being given after the fact. Section 17(1) places no restrictions on a party's right to request reasons after a decision is made. As a matter of common sense, one would think that would be the more frequent use of this section. But obviously, an after-the-fact request would not be possible if the *functus officio* doctrine precludes absolutely the delivery of reasons after a decision has been made.

[115] Finally, given the result in *Chandler*, I question whether the *functus officio* doctrine prevents a tribunal that has delivered inadequate reasons from delivering supplementary reasons in any event.

[116] In *Chandler*, the tribunal exceeded its jurisdiction by making findings and issuing orders it was not authorized to make. The Supreme Court of Canada held the tribunal was entitled to continue the original proceedings in order to fulfill its proper function but on terms that the parties could call further evidence and make further submissions.

[117] Accordingly, where a tribunal fails to fulfill its common law obligation to deliver adequate reasons, why would it be precluded, under the *functus officio* doctrine, from completing its proper function?

[118] I turn now to the appropriateness of considering the Board's supplementary reasons on the judicial review application in light of *R. v. Teskey*.

(3) Application of *Teskey*

[119] Although I am not persuaded that the Board required express statutory authority to issue supplementary reasons in this case and although I am not persuaded that the *functus* doctrine precludes them, I nonetheless conclude that the circumstances under which those reasons were issued raise a concern that they may be the product of result-oriented, after-the-fact reasoning. For that reason, the supplementary reasons should not have been considered on the judicial review application.

[120] In *Teskey,* the majority of the Supreme Court of Canada concluded that written reasons for decision delivered more than 11 months after guilty verdicts were entered by the trial judge should not have been considered on appeal. They reached this conclusion because of the following factors, which demonstrated that a reasonable person would apprehend that the reasons constituted after-the-fact justification for the verdicts already delivered rather an articulation of the reasons that led to the verdict:

- as evidenced by several adjournments of the decision date, the trial judge had obvious difficulty in arriving at a verdict in the months following the completion of the evidence;
- in his oral reasons, the trial judge made a "bare declaration of guilt without any indication of the underlying reasoning";
- after concluding, in error, that he had overlooked affording the accused a right of allocution, the trial judge expressed willingness to reconsider the verdicts immediately after their announcement;
- by its nature, the evidence in the case called for a detailed consideration and analysis;
- the trial judge failed to respond to repeated requests for his reasons;
- reference in the reasons to post-verdict events;
- the 11-month delay in delivering written reasons and the absence of any explanation.

[121] Although perhaps not as egregious, in my view, several features of this case are sufficient to demonstrate that a reasonable person would believe that the Board's supplementary reasons reflect after-the-fact result driven reasons rather than a true reflection of the reasoning process that led to the Board's decision:

- the Board's first set of reasons is conclusory and insufficient to meet the standard of adequate reasons;
- at the time of delivering its first set of reasons, the Board gave no indication of an intention to deliver supplementary reasons;
- the Board's supplementary reasons, consisting of only two-and-a-half pages and very few entirely new paragraphs, was delivered two months after the request for more fulsome reasons;
- in the words of the majority of the Divisional Court, the Board's supplementary reasons are "far from the thorough and careful reasons that are generally issued by members of this Board"—indeed, in my view, if the Board's supplementary reasons do meet the test of adequacy they just get over the line;
- the Board's supplementary reasons provide no explanation of why the Board considered it necessary or appropriate to issue supplementary reasons.

[122] Particularly because of the inadequacy of the Board's first set of reasons and the Board's failure to reserve the right to deliver additional reasons, an explanation was required to assuage concerns that the supplementary reasons were the product of a result-driven, after-the-fact justification process. In the absence of an explanation and taking account of all the circumstances, I conclude that the Board's supplementary reasons should not have been considered on the judicial review application.

III. Disposition

[123] Based on the foregoing reasons, I would allow the appeal and remit the matter for a new hearing before a differently constituted Board. I agree with my colleague's proposed disposition of costs.

0939-07-R (Court File No. 338/09) National Waste Services Inc. –and– National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada)

Certification – Employer – Judicial Review – Stay – National Waste brought an application to stay the Board's order pending a hearing of its application for judicial review of the Board's decision finding it was the true employer of employees involved in a certification application – The Court considered whether or not the appropriate first branch of the test was the "serious issue to be tried" (advanced by the Employer and supported by the decision in *RJR MacDonald*) or a "strong *prima facie*" case (proposed by the union and supported by *Sobeys* and *Ellis-Don*) – The court followed the strong *prima facie* case as the first branch of the test – The case did not raise a constitutional issue and the Court found that the factual dispute in question fell squarely within the expertise of the Board – The Employer failed to meet the threshold that there was a strong *prima facie* case, as well as the other two branches necessary for a stay – Request denied

Superior Court of Justice (Divisional Court), Jennings J., October 20, 2009

ENDORSEMENT

[1] The Ontario Labour Relations Board ("OLRB") issued a decision dated June 8, 2009, certifying the responding party union ("the union") as the bargaining agent for certain employees of National Waste Services Inc. ("National Waste").

[2] The sole issue in the certification application was whether National Waste was the true employer of the employees the union sought to represent or whether they were the employees of a third party services provider. Prior to the determination of that issue the representation vote was held and of the 42 eligible ballots counted, 40 were in favour of certification of the union.

[3] The Board found National Waste was the true employer. National Waste has brought an application seeking judicial review of that decision which, I am told, because of counsel schedules cannot be heard until January 2010. National Waste now seeks a stay of the Board's order pending the hearing of its application.

[4] The union submits that the test to be met by National Waste before the extraordinary remedy of a stay may be granted requires National Waste to demonstrate that:

(a) there is a strong *prima facie* case for judicial review.

(b) the applicant will suffer irrevocable harm absent a stay and
(c) the balance of convenience favours granting a stay.

[5] The union relies on *Ellis-Don v. OLRB et al.* (1992), 10 O.R. (3d) 729; *Knobb Hill Farms v. OLRB*, [1991] OLRB Rep. July 932 and the cases referred to in paragraph 15 of its factum.

[6] Relying upon *R. J. R. MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, counsel for National Waste made a forceful submission that the first step in the test is not that the applicant must demonstrate that it has a strong *prima facie* case, but merely that it has raised a serious issue to be determined by the panel.

[7] In her argument before me counsel for the union conceded that if the standard is "serious issue to be determined" National Waste has satisfied that branch of the test. She agrees that "a serious issue to be determined" is a significantly lower threshold than "strong *prima facie* case".

[8] Counsel's facta were not as helpful on this issue as I would have liked. Counsel for the moving party did not cite any of the cases to which I will refer which support the "strong *prima facie* case" standard and counsel for the union did not refer to *R.J.R.* let alone attempt to distinguish it.

[9] Prior to the release of the decision of the Supreme Court of Canada in *R.J.R.* (*supra*) in March 1994 the case law in Ontario clearly stood for the proposition that the first step in the test for granting a stay of an order of the OLRB was whether a strong *prima facie* case in favour of setting aside the Board's decision had been made out.

> See *Ellis Don v. OLRB* (*supra*); *Sobeys Inc. v. U.F.C.W., Local 1000A*, 12 O.R. (3d) 157.

[10] Almost two years after *Ellis Don* was decided the Supreme Court of Canada held in *R.J.R. MacDonald* that the decision of the House of Lords in *American Cyanimide*, [1975] A.C. 396 was now generally accepted in Canada as establishing a standard of "serious issue to be tried" as a sufficient threshold test for granting a stay in a constitutional case. The Supreme Court of Canada discusses the rationale for that conclusion in paragraph 48 of its reasons, which may be summarized, in the wording of the judgment, as follows:

> Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. ... It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores* at p.128 that "the American Cyanimide 'serious question' formulation is sufficient in a constitutional case where as indicated below in these reasons the public interest is taken into consideration in the balance of convenience".

[11] In paragraph 56 of its reasons the court referred to an exception to the "serious question to be tried" standard citing *Dialadex Communication Inc. v. Crammond* reflex, (1987), 34 D.L.R. (4th) 392 at 396:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in

> dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and that there is a substantial question to be tried and that on the balance of convenience an injunction should be granted.

The court went on to hold that "to the extent that this exception exists at all it should not be applied in *Charter* cases".

[12] Since *R.J.R.* was decided, the Ontario courts have applied both tests.

[13] In *International Union of Bricklayers*, [1999] O.L.R.B. Rep. September-October 910 O'Driscoll J. referred to the test in *R.J.R.* and to decisions of the Supreme Court of Canada on the severe test to be met to attract appellate intervention in decisions of the O.L.R.B. Relying upon *Ellis Don* (*supra*) and *Sobeys* (*supra*) O'Driscoll J. held that the applicant had not met the test of a strong *prima facie* case and a stay was denied (see paragraphs 18-22 of the reasons).

[14] Recently in *Edgewater Gardens v. OLRB*, [2008] OLRB Rep. July/August 599 (June 18, 2008) Carpenter-Gunn J. had this to say at paragraph 7 of her reasons:

> The issue here is the test that the applicant must meet in order to satisfy me to provide the stay that the applicant is seeking. I have heard submissions from the applicant that the test is one of a serious issue to be tried, and I have heard from the two responding counsel that the appropriate test is a strong *prima facie* case. I have had the opportunity of reviewing the factums and the books of authority [sic] that counsel have provided, and I have determined that the appropriate test to look at, the first prong of the test, is whether or not there has been a strong *prima facie* case. I have been assisted by looking at the decisions of *Ellis Don Limited*, *Sobeys*, and thirdly the International Union of Bricklayers and Allied Craftworkers' decisions referred to in the material before me.

[15] Although Carpenter-Gunn J. does not refer to *R.J.R.*, in her reasons, Mr. Stelmaszynski advised me that he appeared on the motion before her and he assured me that *R.J.R.* was fully canvassed in argument.

[16] On the other hand, the *R.J.R.* test has been applied by motions judges in:

i) *Caterair Chateau Canada Limited v. Ontario*, [1995] O.J. 1674, where a constitutional challenge was raised and referred to;
ii) *Great Blue Heron v. CAW Canada*, [2004] O.L.R.B. Rep. Jan.-Feb. 176 (January 22, 2004);
iii) *Elementary Teachers' Federation of Ontario v. Minister of Labour for Ontario* 2007 Can. LII 35151 (ON S.C.D.C.) (August 27, 2007);
iv) *Xanthoudakis v. OSC* 2009 Can. LII 30146 (ON S.C.D.C.) (April 27, 2009).

[17] In none of those decisions does there appear to have been any analysis of the two standards, but merely an assumption by the motions judge that *R.J.R.* is controlling.

[18] This case does not raise a constitutional issue. The issue is simple and clear cut and, as I understand it, the facts are not substantially in dispute, but rather the interpretation that should be given to the facts. It is difficult to think of privative clauses more strongly worded than those which protect the decisions of OLRB. Courts in this province give considerable deference to decisions of the OLRB. That suggests to me that the following language of this court in *Sobeys* should be applied by me in this case:

> On judicial review the court should not interfere with the Board's decision unless it is patently unreasonable. This is a high standard and on a motion for stay, a strong *prima facie* case must be made out that the high threshold can be met before a stay should be granted. The emphasis must be on the word "strong" and it must go beyond simply what may be an arguable case. We agree with the decision in *Ellis Don Limited v. The Ontario Labour Relations Board*, 10 O.R. (3d) 729.

[19] Notwithstanding that post-*Dunsmuir*, the patently unreasonably standard no longer pertains, this reasoning with respect to granting a stay appears to me to be in keeping with Ontario jurisprudence.

[20] Applying that standard, I turn to the first branch of the test. National Waste has not persuaded me that it has a strong *prima facie* case for judicial review. The OLRB is an highly specialized tribunal. Its decisions are protected by extremely strong privative clauses. On the issue of true employer it heard evidence over two years and gave extensive rational reasons for its findings that National Waste was the true employer. There was ample evidence as reviewed by the Board in its reasons to support that finding. That finding will be reviewed by the panel on a standard of reasonableness with considerable deference owed to the Board. That is particularly so as the true employer question rises squarely within the expertise of the OLRB which is frequently called upon to determine the identity of the employer: *Schuit Plastering & Stucco Inc. v. OLRB* 2009 Can. LII 30145 (ON S.C.D.C.) (May 15, 2009) (Ont. Div. Ct.).

[21] My assessment of whether a strong *prima facie* case exists must be carried out in the context of a reasonableness standard of review that the panel will apply having regard to the issues I have just outlined.

[22] The applicant fails on the first branch of the test.

[23] Had I found that this branch of the test was a serious issue to be determined I would agree with counsel for the union that the applicant had met the standard. It is disturbing to me to find this possible divergence in authority in private law cases not involving constitutional issues and I would hope that at an appropriate time the question could be considered by an appellate court.

[24] My finding that National Waste has failed to meet the first part of the three part test is dispositive of this motion for a stay. However, in the event that I am in error in the standard to be applied I will consider the other two steps in the test.

Irreparable harm

[25] National Waste must establish clearly that it will suffer harm not compensable in damages. Its chief concern appears to be that as a result of the certification it now must bargain in good faith to

reach a collective agreement, prior to the application for judicial review coming on for hearing. No authority was cited to me to support the proposition that complying with the requirement to embark upon the collective bargaining process at this stage can be said to constitute irreparable harm. The decision of Osler J. in *Wells Fargo Armcar Inc. v. OLRB* (1981), 34 O.R. (2d) 99 at 101 would suggest the contrary to be true. Given that the application will be heard by the panel in a relatively short time, I cannot find that irreparable harm has been demonstrated.

Balance of convenience

[26] The courts of this province have frequently considered the delay a stay will cause to the expressed desire of employees to be represented by a trade union. Courts have held that labour relations delayed are labour relations defeated and that delay works unfairness and hardship on the expectations of the employees. No similar concerns are visited upon the employer. In my opinion, the balance of convenience clearly favours the union.

Conclusion

[27] The motion for a stay is dismissed. If the parties cannot agree on costs, brief submissions not to exceed three pages may be made within 14 days of the release of these reasons.

CASE LISTINGS AUGUST 2009

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 2009

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0795-08-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Reliance Construction of Canada Ltd. and, Reliance Construction (Ontario) Ltd. o/a Reliance Construction Group (Respondents)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Reliance Construction (Ontario) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Reliance Construction (Ontario) Ltd. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1555-08-R: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Straun William Costie c.o.b. as CC Group Contracting (Respondent)

Unit: "all painters and painters' apprentices in the employ of Straun William Costie c.o.b. as CC Group Contracting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Straun William Costie c.o.b. as CC Group Contracting in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) *(Clarity Note)*

1991-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Gervais Landscaping & Excavation Limited (Respondent)

Unit: "all construction labourers in the employ of Gervais Landscaping & Excavation Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Gervais Landscaping & Excavating Limited in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working-foreman" (3 employees in unit)

3044-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Wall-Tech Restoration Inc. (Respondent)

Unit: "all construction labourers in the employ of Wall-Tech Restoration Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Wall-Tech Restoration Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0639-09-R: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Precision Sheet Metal Inc. (Respondent)

Unit: "all sheet metal workers and sheet metal workers' apprentices in the employ of Precision Sheet Metal Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sheet metal workers and sheet metal workers' apprentices in the employ of Precision Sheet Metal Inc. in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0965-09-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. Biggs Fire Suppression Inc. (Respondent)

Unit: "all sprinkler fitters and sprinkler fitters' apprentices in the employ of Biggs Fire Suppression Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sprinkler fitters and sprinkler fitters' apprentices in the employ of Biggs Fire Suppression Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1118-09-R: Construction Workers, Local 53 affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. Postma Heating and Cooling Inc. (Respondent)

Unit: "all journeymen and apprentice refrigeration and air conditioning mechanics, journeymen and apprentice sheet metal workers, and construction labourers in the employ of Postma Heating and Cooling Inc. in all sectors of the construction industry in the Counties of Essex and Kent and in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (21 employees in unit)

1225-09-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Luc Charles Electrical (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Luc Charles Electrical in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Luc Charles Electrical in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office and in the Townships of Springer, Pedley, Grant, Field, Badgerow, Caldwell, Latchford, Bertram and Patterson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (6 employees in unit)

1228-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1722871 Ontario Inc. o/a Incore Interior Exterior Contracting (Respondent)

Unit: "all painters and painters' apprentices in the employ of 1722871 Ontario Inc. o/a Incore Interior Exterior Contracting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of 1722871 Ontario Inc. o/a Incore Interior Exterior Contracting in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) *(Clarity Note)*

1241-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. World Scaffold Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of World Scaffold Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of World Scaffold Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

1244-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Helder Lopes c.o.b. Lopes Concrete Finishing (Respondent)

Unit: "all construction labourers in the employ of Helder Lopes c.o.b. Lopes Concrete Finishing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Helder Lopes c.o.b. Lopes Concrete Finishing in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (3 employees in unit)

1294-09-R: International Brotherhood of Electrical Workers Construction Council of Ontario (Applicant) v. Gannon/Blackburn Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Gannon/Blackburn Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Gannon/Blackburn Electric Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1302-09-R: International Union of Elevator Constructors, Local 50 (Applicant) v. City Elevator Company Limited (Respondent)

Unit: "all journeymen and apprentice elevator constructors in the employ of City Elevator Company Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice elevator constructors in the employ of City Elevator Company Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1307-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J Group Construction (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of J Group Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and all carpenters and carpenters' apprentices in the employ of J Group Construction in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1344-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Arpad Botond Pall c.o.b. B.O.S.S. Drywall (Respondent)

Unit: "all painters and painters' apprentices in the employ of Arpad Botond Pall c.o.b. B.O.S.S. Drywall in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Arpad Botond Pall c.o.b. B.O.S.S. Drywall in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (Clarity Note)

1378-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. D2F Contractors Ltd. (Respondent)

Unit: "all construction labourers in the employ of D2F Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of D2F Contractors Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1426-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1349101 Ontario Inc. o/a J. Group Construction (Respondent)

Unit: "all painters and painters' apprentices in the employ of 1349101 Ontario Inc. o/a J. Group Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of 1349101 Ontario Inc. o/a J. Group Construction in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (10 employees in unit) (Clarity Note)

1443-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Reliable Painters & Decorators, Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Reliable Painters & Decorators, Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland; the County of Simcoe and the District Municipality of Muskoka; the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (50 employees in unit)

Bargaining Agents Certified Subsequent to Vote

1252-05-R: Labourers' International Union of North America, Local 625 (Applicant) v. Vansmit Ltd. o/a Jay-Dee Concrete Forming (Respondent)

Unit: "all labourers, carpenters and carpenters' apprentices in the employ of Vansmit Ltd. o/a Jay-Dee Concrete Forming in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

0649-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Imperial Parking Canada Corporation (Respondent) v. Service Employees International Union Local 2.on, Brewery, General and Professional Workers' Union (Intervener)

Unit: "all employees of Imperial Parking Canada Corporation employed at Toronto Lester B. Pearson International Airport in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, clerical and office staff" (87 employees in unit)

Number of names of persons on revised voters' list	90
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	58
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	52
Number of ballots marked in favour of intervener	5
Number of ballots segregated and not counted	14

1184-09-R: Niagara Health Care and Service Workers Union Local 302 affiliated with Christian Labour Association of Canada (Applicant) v. Tabor Manor (Respondent)

Unit: "all employees of Tabor Manor in the City of St. Catharines, save and except the Administrator, Director of Nursing, RAI Coordinator, Supervisors, persons above the rank of Supervisor, office and clerical staff" (127 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	129
Number of persons who cast ballots	106
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	104
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	56
Number of ballots marked against applicant	47

Number of ballots segregated and not counted	2

1206-09-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Jemini Motel Holdings o/a Comfort Inn Airport North Bay (Respondent)

Unit: "all employees of Jemini Motel Holdings o/a Comfort Inn Airport North Bay, located at 1200 O'Brien Street, located in the City of North Bay, save and except Assistant Manager and persons above the rank of Assistant Manager" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

1243-09-R: Teamsters Local Union No. 938 (Applicant) v. Ryder Truck Rental Canada Ltd. (Respondent)

Unit: "all employees of Ryder Truck Rental Canada Ltd. at 672 and 666 Kipling Avenue in the City of Toronto, save and except the following: supervisors, persons above the rank of supervisor, office, clerical, sales including parts and counterpersons and summer students employed during the school vacation period" (14 employees in unit) *(Clarity Note) (Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

1309-09-R: The Canadian Union of Public Employees (Applicant) v. AIDS Niagara (Respondent)

Unit: "all employees employed by AIDS Niagara Supportive Housing in the City of St. Catharines, save and except supervisors and persons above the rank of supervisor" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

1349-09-R: United Food and Commercial Workers International Union, (UFCW Canada) (Applicant) v. Burlington 2020 Lakeshore Inc. o/a Travelodge Hotel (Respondent)

Unit: "all employees of Burlington 2020 Lakeshore Inc. o/a Travelodge Hotel located in the City of Burlington, Ontario save and except Supervisors, persons above the rank of Supervisor, Executive Housekeeper, Maintenance, Doorman/Bellman, Banquet, Restaurant Room Services and Kitchen Employees, Front Desk, Night Auditors, Sales, Conference Services, Office, Clerical Staff, Security Staff and any other employees covered by any existing collective agreement." (20 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

1131-07-R: Construction Workers Local 52 affiliated with Christian Labour Association of Canada (Applicant) v. Michael Monteith Enterprises Limited and Monteith Building Group Ltd. (Respondent) v. The Labourers International Union of North America, Ontario Provincial District Council, Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Interveners)

1334-09-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Alta Vista Manor Inc. (Respondent)

Unit: "all employees employed by Alta Vista Manor Inc. at 751 Peter Morand Crescent, Ottawa, Ontario, K1G 6S9, save and except supervisors and those above the rank of supervisors" (107 employees in unit)

Applications for Certification Dismissed Subsequent to Vote

0170-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. Transfreight Integrated Logistics Inc. (Respondent)

Unit: "all employees of Transfreight Integrated Logistics Inc. in the City of Woodstock, save and except office and clerical staff, supervisors, and persons above the rank of supervisor" (54 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	106
Number of persons who cast ballots	100
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	54
Number of segregated ballots cast by persons whose names appear on voter's list	46
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	63
Number of ballots segregated and not counted	0

1188-09-R: Health Care and Service Workers Union, Local 304 affiliated with the Christian Labour Association of Canada (Applicant) v. William Osler Health Care Center Clerical Full-Time (Respondent) v. Service Employees International Union, Local 1, Canada (Intervener)

Unit: "all office and clerical employees of the Northwest GTA Hospital Corporation (WILLIAM OSLER HEALTH CENTRE effective August 1, 1999), save and except supervisors, persons above the rank of supervisor, secretaries to the President and CEO, Vice Presidents, Directors, Administrative Directors, Medical Chief of Staff, Medical Chiefs of Service, persons regularly employed for not more than twenty-four hours per week, persons employed for school vacation periods and employees covered by other collective agreements" (287 employees in unit)

Number of names of persons on revised voters' list	290
Number of persons who cast ballots	212
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	182
Number of segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	90
Number of ballots marked in favour of intervener	118
Number of ballots segregated and not counted	3

1290-09-R: Teamsters Local Union No. 938 (Applicant) v. Turtle Island Recycling Corporation (Respondent)

Unit: "all employees of Turtle Island Recycling Corporation based in York Region in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students" (48 employees in unit)

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	59
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	55
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	4

1304-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. LifeLabs LP (Respondent)

Unit: "all employees of LifeLabs LP in the Town of Richmond Hill and at 7700 Bathurst Street in the City of Toronto, save and except salespersons, supervisors and persons above the rank of supervisor" (22 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	9

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	9

Applications for Certification Withdrawn

1135-07-R: Labourers' International Union of North America, Local 527 (Applicant) v. Massicotte Const. Ltd. (Respondent)

3869-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. HSE Integrated Ltd. (Respondent)

2170-08-R: Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jeffery G. Wallans Construction Limited (Respondent)

3718-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. JB Excavators (Algoma) Inc. and, Palmer Construction Group Inc. (Respondents) v. international Union of Operating Engineers, Local 793 (Intervener)

0383-09-R: Labourers' International Union of North America, Local 625 (Applicant) v. Enzo Paving Inc. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2360-07-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. E. & E. Seegmiller Limited, Preston Sand & Gravel Company Limited and, Teamsters Local Union No. 879 (Respondents) (Withdrawn)

1682-08-R: International Union of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Harrison Glass & Mirror Co. Ltd., Trade Services Inc., TSI Canada Inc., TSI Glass & Mirror Inc. (Respondents) (Dismissed)

1854-08-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. The Plan Group Inc. and, Andrew DePippo and Nathalie DePippo o/a PIP Construction (Respondents)(Dismissed)

3058-08-R: United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Applicant) v. Easton's Toronto Airport Hotel (Caroga) L.P., Easton's Group of Hotels Inc., and, 887812 Ontario Inc. (Respondents) v. 1719187 Ontario Inc. operating as "Hilton Garden Inn Mississauga/Toronto Airport" (Intervener) (Withdrawn)

3064-08-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Deltan Contractors Ltd., Deltan Drywall Contractors Ltd. and, Prime Drywall Inc., Tek Administration Ltd. (Respondents) (Granted)

0023-09-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 1716616 Ontario Limited (o/a Capco Construction), 1414873 Ontario Inc. (c.o.b. Commercial Construction Ottawa), 1561908 Ontario Inc. (c.o.b. Commercial Construction Ontario), 6788912 Canada Inc. and, Rodney Capstick (Respondents) (Granted)

0695-09-R: Canadian Union of Public Employees and its Local 2256 (Applicant) v. Bathurst Jewish Centre and, Jewish Federation of Greater Toronto (Respondents) (Withdrawn)

1262-09-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Supercity Drywall Ltd., Supercity Drywall (2006) Inc. (Respondents) (Endorsed Settlement)

SALE OF A BUSINESS

1682-08-R: International Union of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Harrison Glass & Mirror Co. Ltd., Trade Services Inc., TSI Canada Inc., TSI Glass & Mirror Inc. (Respondents) (Dismissed)

1854-08-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. The Plan Group Inc. and, Andrew DePippo and Nathalie DePippo o/a PIP Construction (Respondents)(Dismissed)

3058-08-R: United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Applicant) v. Easton's Toronto Airport Hotel (Caroga) L.P., Easton's Group of Hotels Inc., and, 887812 Ontario Inc. (Respondents) v. 1719187 Ontario Inc. operating as "Hilton Garden Inn Mississauga/Toronto Airport" (Intervener) (Withdrawn)

3064-08-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Deltan Contractors Ltd., Deltan Drywall Contractors Ltd. and, Prime Drywall Inc., Tek Administration Ltd. (Respondents) (Granted)

0023-09-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 1716616 Ontario Limited (o/a Capco Construction), 1414873 Ontario Inc. (c.o.b. Commercial Construction Ottawa), 1561908 Ontario Inc. (c.o.b. Commercial Construction Ontario), 6788912 Canada Inc. and, Rodney Capstick (Respondents) (Granted)

0695-09-R: Canadian Union of Public Employees and its Local 2256 (Applicant) v. Bathurst Jewish Centre and, Jewish Federation of Greater Toronto (Respondents) (Withdrawn)

1262-09-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Supercity Drywall Ltd., Supercity Drywall (2006) Inc. (Respondents) (Endorsed Settlement)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1108-09-R: Rae Anne Dawson (Applicant) v. Canadian Auto Workers Union (Respondent) (Terminated)

1316-09-R: Robert Monty & the employees of Lafarge Construction Materials (Applicant) v. United Steelworkers Local 1-2693, formerly I.W.A. Canada Local 2639 (Respondent) v. Lafarge Aggregate and Concrete (Intervener) (Granted)

Unit: "the Company recognizes the Union as the sole collective bargaining agent for all employees engaged on the operations of the Company in the district of Thunder Bay; save and except foreman, persons above the rank of foreman, office staff, batchers in the City of Thunder Bay and persons bound by collective agreements to with the Company is party to" (13 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	8
Number of ballots segregated and not counted	0

1329-09-R: Kyla Forth Gosselin (Applicant) v. Retail, Wholesale & Department Store Union, District Council (Respondent) (Terminated)

1350-09-R: 1138806 Ontario Limited carrying on business as Best Western Mariposa Inn & Conference Center (Applicant) v. United Food and Commercial Workers International Union, Local 1000A (AFL-CIO-CLC) (Respondent) (Dismissed)

1450-09-R: St. Michael's Homes (Applicant) v. Service Employees International Union Local 1 Canada (Respondent) (Granted)

1451-09-R: Employees of WHL Management Limited Partnership et al (Applicant) v. United Food and Commercial Workers International, Local 175 (Respondent) v. WHL Management Limited Partnership (Intervener) (Dismissed)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1250-09-U: Annan & Bird Lithographers Ltd. (Applicant) v. Communications, Energy, and Paperworkers Union and its Local 591G, John Salter, Johannes Ritter, Brad Corcoran and Mike Egerton (Respondent) (Withdrawn)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1320-05-U: Labourers' International Union of North America, Local 625 (Applicant) v. Vansmit Ltd. o/a Jay-Dee Concrete Forming and Dave Vanderwerf and John Vanderwerf (Respondent) (Terminated)

3447-06-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 707 (Applicant) v. Ford Motor Company of Canada Limited and, Communications, Energy and Paperworkers Union of Canada, Local 2003-26 (Respondents) (Dismissed)

2362-07-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. E. & E. Seegmiller Limited, Preston Sand & Gravel Company Limited and, Teamsters Local Union 879 (Respondents) (Withdrawn)

3494-07-U: John "Todd" Wood (Applicant) v. United Food and Commercial Workers Union Canada, Local 1000A (Respondent) v. National Grocers Co. Ltd. (Intervener) (Withdrawn)

3595-07-U: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. PPG Canada Inc., Liberty Staffing Services Inc., and/or The Staffing Edge Inc. (Respondents) (Withdrawn)

1062-08-U: International Brotherhood Of Electrical Workers, Local 586 (Applicant) v. Reliance Construction (Ontario) Ltd. (Respondent) (Withdrawn)

1966-08-U: International Union of Operating Engineers, Local 793 (Applicant) v. Star Concrete Pumping Inc. (Respondent) (Withdrawn)

2208-08-U: Harvinder Singh Khanna (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) (Dismissed)

2888-08-U: Rocchina Giordanella (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Ryerson University (Intervener) (Dismissed)

2920-08-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Native Child and Family Services of Toronto (Respondent) (Terminated)

3043-08-U: Guoqing Chao (Gerry) (Applicant) v. Unite Here Canada (Local 75) (Respondent) v. Yonge Street Hotels c.o.b. as the Courtyard by Marriott Downtown Toronto (Intervener) (Dismissed)

3084-08-U: Universal Workers Union, L.I.U.N.A, Local 183 (Applicant) v. The Toronto Humane Society (Respondent) (Withdrawn)

3361-08-U: Donna Isla-Mae Falls (Applicant) v. CAW Local 1120 (Respondent) v. Sault Area Hospital (Intervener) (Dismissed)

3363-08-U: Roberto Pimentel (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 4610 (Respondent) v. Frito Lay Canada (Intervener) (Dismissed)

3677-08-U: Ontario Public Services Employees Union (Applicant) v. Parents of Technologically Dependent Children of Ontario (Kids Country Club) (Respondent) (Withdrawn)

3690-08-U: Anne Wisson (Applicant) v. Ontario Public Service Employee's Union (Respondent) v. The Crown in Right of Ontario as represented by the Ministry of Attorney General (Intervener) (Dismissed)

0014-09-U: Ontario Public Service Employees Union (Applicant) v. Whitby Mental Health Centre (Respondent) (Withdrawn)

0133-09-U: United Food and Commercial Workers Union Canada, Local 175 (Applicant) v. A.L.C. Manufacturing Inc. (Respondent) (Granted)

0234-09-U: Daniel Lee (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 414 (Respondent) v. Metro Ontario Inc. (Intervener) (Dismissed)

0411-09-U: Teamsters Local Union No. 419 (Applicant) v. Millard Refrigerated Services, Inc. (Respondent) (Terminated)

0442-09-U: Service Employees International Union, Local 1 Canada (Applicant) v. Norwood Nursing Home (Respondent) (Withdrawn)

0478-09-U: Maria Rodrigues (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario (Ministry of Labour) (Intervener) (Dismissed)

0492-09-U: Labourers' International Union of North America, Local 625 (Applicant) v. Enzo Paving Inc. (Respondent) (Withdrawn)

0495-09-U: Mike Consiglio (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (Withdrawn)

0720-09-U: William Thomson (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) (Dismissed)

0744-09-U: Precision Sheet Metal Inc. (Applicant) v. Sheet Metal Workers' International Association, Local 269 (Respondent) (Withdrawn)

0776-09-U: Eileen Lane (Applicant) v. CAW Local 414 of the National Automobile, Aerospace, Transportation and General Workers' Union of Canada (Respondent) v. Metro Ontario Inc. (Intervener) (Withdrawn)

0824-09-U: Dolores Schram (Applicant) v. CAW Local 636 (Respondent) v. Woodstock General Hospital Trust (Intervener) (Dismissed)

0843-09-U: Joyce Ndemera (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) (Dismissed)

0921-09-U: Darryl Rath (Applicant) v. CAW Local 27 (Respondent) (Withdrawn)

0975-09-U: Dayne Jackson (Applicant) v. Telecommunications Workers Union (Respondent) (Dismissed)

0998-09-U: David Mulcahy (Applicant) v. Teamsters Local Union No. 879 (Respondent) (Dismissed)

1047-09-U: Sheldon Green (Applicant) v. Teamsters Local Union 938 (Respondent) v. United Parcel Service (Intervener) (Dismissed)

1095-09-U: Louise Ruddock (Applicant) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Respondent) v. Hurley Corporation (Intervener) (Withdrawn)

1138-09-U: Parmar Kalpeshkumar (Applicant) v. international Association of Machinists and Aerospace Workers (Respondent) (Terminated)

1220-09-U: Teamsters Local Union No. 419 (Applicant) v. Millard Refrigerated Services-Canada, ULC (Respondent) (Terminated)

1267-09-U: Eric Daniel Deschamps (Applicant) v. Teamsters Canada Rail Conference Maintenance of Way Employees Division (Respondent) (Dismissed)

1274-09-U: Kingsley Adams (Applicant) v. Teamsters Local Union 938 (Respondent) (Withdrawn)

APPLICATION FOR INTERIM ORDER

1222-09-M: Teamsters Local Union No. 419 (Applicant) v. Millard Refrigerated Services-Canada, ULC (Respondent) (Terminated)

JURISDICTIONAL DISPUTES

2358-07-JD: United Food & Commercial Workers International Union, Local 175 (Applicant) v. E. & E. Seegmiller Limited, Preston Sand & Gravel Company Limited and, Teamsters Local Union No. 879 (Respondents) (Withdrawn)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2808-08-OH: Halyna Hritzkiv (Applicant) v. Richard Stein Pharmacy Ltd., The Medicine Shoppe (Respondent) (Terminated)

0171-09-OH: Luka Putica (Applicant) v. Tampa Interior Systems Inc. (Respondent) v. Drywall Acoustics Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Intervener) (Withdrawn)

0217-09-OH: Timothy Whitehead (Applicant) v. Xstrata Nickel Sudbury Operations (Respondent) (Withdrawn)

0238-09-OH: Sophia Stamos (Applicant) v. Agraturf Equipment Services Inc. (Respondent) (Withdrawn)

0726-09-OH: Samir Al Yousif (Applicant) v. Jayfer Automotive Group (Markham) Inc. o/a Markham Mazda (Respondent) (Withdrawn)

0750-09-OH: Louise A. Gore (Applicant) v. Perley and Rideau Veterans' Health Centre (Respondent) v. Canadian Union of Public Employees, Local 870 (Intervener) (Withdrawn)

0773-09-OH: Miles Tompkins (Applicant) v. Miska Trailers (Respondent) (Terminated)

1086-09-OH: Danielle Wilson (Applicant) v. ECO Living Cleaners Inc. (Respondent) (Withdrawn)

1321-09-OH: Kevin & Melanie Gordon (Applicant) v. Drewlo Holdings Inc. (Respondent) v. Elaine Shayler, Robert & Anne Stronge, Robert Renaud & Denise Dezeil (Interveners) (Withdrawn)

CONSTRUCTION INDUSTRY GRIEVANCES

2327-06-G: Teamsters Construction Council of Ontario, International Brotherhood of Teamsters (Applicant) v. RNR Mechanical Contractors Inc. (Respondent) v. United Brotherhood of Carpenters' and Joiners' of America, Local 1256 (Intervener) (Withdrawn)

2516-07-G: The International Union of Painters and Allied Trades, Local Union 1590 (Applicant) v. New Millenium (Respondent) (Granted)

3294-07-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Spadas Decorating & Painting Limited and, Boardwalk Painting & Decorating Inc. (Respondents) (Withdrawn)

3326-07-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Manel Contracting Ltd. (Respondent) (Endorsed Settlement)

3787-07-G: Concord Trimming Inc. (Applicant) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Respondent) (Withdrawn)

1363-08-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Aker Kvaerner Songer Canada (Respondent) v. Millwrights Regional Council of Ontario (Intervener) (Withdrawn)

2425-08-G: Quality Control Council of Canada (Applicant) v. Rad-Con Testing Inc. (Respondent) (Granted)

0287-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Dow Electric Inc. (Respondent) (Withdrawn)

0342-09-G: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. First Canadian Builders Group Inc. (Respondent) (Granted)

0396-09-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Revenco (1991) Inc. (Respondent) (Withdrawn)

0686-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. United Plumbing Inc. (Respondent) (Terminated)

0805-09-G: The United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Ian Dejordan c.o.b. I.D.M Refinishing (Respondent) (Granted)

0848-09-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. M & I Aluminum Ltd. (Respondent) (Withdrawn)

0912-09-G: Labourers' International Union of North America, Local 506 (Applicant) v. Saicon Construction Ltd. (Respondent) (Withdrawn)

0959-09-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Sirron Electrical Contracting Corp. (Respondent) (Withdrawn)

1096-09-G: Labourers' International Union of North America, Local 506 (Applicant) v. Terra Construction Ltd./Terra Structures Inc. (Respondent) (Endorsed Settlement)

1097-09-G: Labourers' International Union of North America, Local 506 (Applicant) v. Terra Construction Ltd. (Respondent) (Withdrawn)

1162-09-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Premform Limited (Respondent) (Granted)

1165-09-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Jemini Construction Ltd. (Respondent) (Withdrawn)

1181-09-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 6665268 Canada Inc. o/a Absolute Installations (Respondent) (Endorsed Settlement)

1183-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Terrastone Construction Inc. (Respondent) (Granted)

1194-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joe Da Silva c.o.b. as JD Installations/JD Cold Rooms (Respondent) (Endorsed Settlement)

1195-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 6665268 Canada Inc. o/a Absolute Installations (Respondent) (Endorsed Settlement)

1226-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Metro Painters (2004) Limited (Respondent) (Granted)

1251-09-G: International Brotherhood Of Electrical Workers, Local 586 (Applicant) v. Andrew DePippo and Nathalie DePipo o/a PIP Construction (Respondent) (Withdrawn)

1253-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Pro Glass Services Inc. (Respondent) (Granted)

1264-09-G: Construction Workers Local 52 affiliated with Christian Labour Association of Canada (Applicant) v. North America Construction (1993) Ltd. (Respondent) (Withdrawn)

1270-09-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) (Granted)

1271-09-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) (Granted)

1303-09-G: International Brotherhood of Electrical Workers Electrical Power Council of Ontario (Applicant) v. E.S. Fox Limited (Respondent) (Withdrawn)

1348-09-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Edward C. Kosciuch c.o.b. as All City Drywall & Acoustics (Respondent) (Endorsed Settlement)

1372-09-G: Brick and Allied Craft Union of Canada, Local 5 (Applicant) v. George and Asmussen Limited (Respondent) (Withdrawn)

1376-09-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Lotto Pumping and Hydrovac Services/Lotto Sanitation Inc. (Respondent) (Terminated)

1379-09-G: Construction Workers Local 53, CLAC affiliated with the Christian Labour Association of Canada (Applicant) v. Liftsafe Engineering and Service Group Inc. (Respondent) (Withdrawn)

1386-09-G: The International Union of Painters and Allied Trades, Local Union 200 (Applicant) v. Sean Brophy and Jeff Coleman c.o.b. as I.R.C. Painting (Respondent) (Granted)

1421-09-G: Labourers' International Union of North America, Local 625 (Applicant) v. LaSalle Backhoe Service (Respondent) (Terminated)

1441-09-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Barry Sculland o/a B. Sculland Electric (Respondent) (Granted)

APPLICATIONS FOR ACCREDITATION

0516-07-R: Electrical Power Systems Construction Association (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council (Respondent) (Granted)

3744-08-R: Mechanical Contractors Association Ontario (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and, Ontario Pipe Trades Council, and, United Association Locals 46, 67, 71, 221, 463, 508, 527, 552, 593, 599, 628, 663, 666 and, 800 (Respondents) v. Electrical Power Systems Construction Association (Intervener) (Granted)

APPEALS - EMPLOYMENT STANDARDS ACT

0362-07-ES: Richard A. Wilkinson, a Director of Howell Energraphics Inc. (Applicant) v. Al Van Beilen and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0867-07-ES: Bridget Jameus (Applicant) v. Nucomm Marketing Inc., and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1898-08-ES: William Wai Man Fong a Director of Blue Point Oyster Bar & Supper Club (Applicant) v. Kin Mah, Director of Employment Standards (Respondents) (Terminated)

2312-08-ES: Kularaj Kulasingam (Applicant) v. Magna Powertrain Inc. o/a Toral Cast Integrated Technologies, Director of Employment Standards (Respondents) (Dismissed)

3020-08-ES: Noor Ejaz (Applicant) v. 1512081 Ontario Limited o/a Abrams Towing Limited, and, Director of Employment Standards (Respondents) (Dismissed)

3087-08-ES: Arquelao Ortiz (Applicant) v. BioCrude Technologies Inc., and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3338-08-ES: Pivotal Integrated HR Solutions (Applicant) v. Farida Abbasi, Nike Agbaire, Hasina Akhter, Tasneem Alam, Salome Michell Alfonso, Edgardo Alora, Zenaida Alora, Rukhsana Amjad, Manjeet Anand, Perlita Andres, Gettha Appadurai, Juan Ayesta, Gurvinder Bagri, Heidi Bajdowicz, Nafees Begum, Harmeet Kaur Bhatti, Robert Birch, Parvinder Kaur Brar, Michael Elvis Aaron Butts, Nieva Julita Castro, Salvador Castro, Parmjit Kaur Chadde, Amal Choghri, Lino Tiburcio Desousa, Shyamala Douglas, Sharda Dudhia, Jeany Eshoo, Jessie Lee Fancy, Saeed Ahmed Faridi, Tazeen Faridi, Nicola Galloro, Jayantpunita Ghughu, Joga Singh Gill, Linda Govereau, Fayaz Hosein, Monday Sam Idoro, Yanick Isaacs, Darshan Singh Jabal, Harjit Kaur Jabal, Zubeda Jaffer, Faizan Jaffery, Neelofar Jaffery, Rizwan Jaffery, Sana Jaffery, Amandeep Jassal, Balwinder Jassal, Satinder Singh Jassal, Farhat Jehan, Ranjit Kainth, Sripancharatnam Kanagaratnam, Nirupama Raju Kapure, Jaspreet Kaur, Joginder Kaur, Shahnaz Khan, Veena Devi Khatri, Malini Kuganesan, Halina Kurek, Lalitha Lakra, Noreen Mahboob, Rozina Mahboob, Pardeep Mahil, Satnam Singh Mandair, Florence Martin, Maninder Minhas, Sameena Minhas, Ma Arlene Mogul, Tajeckhatim Mohamed, Sadaf Mubashir, Sumesh Nanda , Gulshan Nissa, Albert Miroslav Nos, Charles Ogieva, Parmjit Kaur Palaha, Smita Pandya, Jesusa Medina Paras, Roberto Sangalang Paras, Archanaben Patel, Hemlata Patel, Kishoriben Patel, Krishna Patel, Manubhai B Patel, Minaxiben Babub Patel, Pravinbhai Patel, Ramila Patel, Rita Patel, Sunitaben Patel, Ushaben Patel, Yoginaben Patel, Glencia Peters, Christie Radhika, Sritharan Raman, Dinesh Ramchandani,

Robina Rehman, Harpreet Sahdev, Gurdev Sandhawalia, Rewathy Sasiharan, Shyamala Satyajit, T Dennis Selladurai, Bhavna Shah, Sukhjinder Shaheed, Kamlesh Sharma, Manju Sharma, Razia Khatoon Siddiqui, Balveer Kaur Sidhu, Sukhdeep Kaur Sidhu, Rakesh Sikka, Amarjit Singh, Deonarine Singh, Kuldip Kaur Singh, Yasmattie Singh, Ajaypal Singh Soor, Balbir Singh Soor, Esaivani Sripancharatnam, Vasanthadevi Sripatkunan, Ghousia Sultana, Ishrat Sultana, Sivaneswary Sundaramoorthy, Renu Suri, Vipinchandra M Suthar, Sarojben Vipin Suthar, Kashifa Syed, Phin-Yoon Tam, Veronica Terry, Surjit Kaur Thiara, Vidyaben Vaidya, Michael Vallis, Rashmi Verma, Lynn Cammie Watson and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3446-08-ES: Grove Galligan (Applicant) v. infonex Inc. and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3523-08-ES: Salcros Maintenance Contractors Ltd. (Applicant) v. Kelly Haggerty, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3525-08-ES: Salcros Maintenance Contractors Ltd. (Applicant) v. Gordon Haggerty, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3526-08-ES: Salcros Maintenance Contractors Ltd. (Applicant) v. Margaret Richmond, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3527-08-ES: Krishan Goela (Applicant) v. 1395551 Ontario Inc. o/a Caramella Fine Jewellery, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3528-08-ES: Salcros Maintenance Contractors Ltd. (Applicant) v. Kody Haggerty, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

3770-08-ES: Nancy Whalley (Applicant) v. J.H. MacArthur Professional Dentistry Corporation/Alesar Inc. and, Director of Employment Standards (Respondents) (Dismissed)

3771-08-ES: 407994 Ontario Limited o/a The Bingo Paper Company (Applicant) v. Sandra Morris and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0057-09-ES: 1729105 Ontario Inc. o/a Wild Wing Georgetown (Applicant) v. Erica Mercer and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0058-09-ES: Bellini's Restorante (Applicant) v. Tultul Routh and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0084-09-ES: Legrand Bertrand (Applicant) v. Primary Response Inc., and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0086-09-ES: 1666967 Ontario Inc. o/a Pumpernickels (Applicant) v. Salvinu Cassa, and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0096-09-ES: Brittany Clouston (Applicant) v. Winds of Change Day Spa Ltd. and, Director of Employment Standards (Respondents) (Withdrawn)

0161-09-ES: 1339048 Ontario Inc. o/a Lakers Tap & Grill Games (Applicant) v. Adam Neilson and, Director of Employment Standards (Respondents) (Dismissed)

0162-09-ES: 1339048 Ontario Inc. o/a Lakers Tap & Grill Games (Applicant) v. Derek T.S. Elliott and, Director of Employment Standards (Respondents) (Dismissed)

0163-09-ES: 1339048 Ontario Inc. o/a Lakers Tap & Grill Games (Applicant) v. Wilma Adrians and, Director of Employment Standards (Respondents) (Dismissed)

0166-09-ES: 1675159 Ontario Corporation o/a The Bristol Place Your Neighbourhood Pub and Eatery (Applicant) v. Jordan MacKenzie, Director of Employment Standards (Respondents) (Endorsed Settlement)

0232-09-ES: Fadi N. Elhami, A Director of 1653563 Ontario Inc. c/o as Golden Griddle (Applicant) v. Senthuran Yogarajoh, Elisha Zoberman, Thavarajakulasingham Tharmalinngham, Sritharan Varithiljngham, Director of Employment Standards (Respondents) (Endorsed Settlement)

0242-09-ES: Santha Tsang (Applicant) v. Mon Sheong Foundation, Director of Employment Standards (Respondents) (Endorsed Settlement)

0258-09-ES: Darren Hickin (Applicant) v. Pan-Oston Ltd. and, Director of Employment Standards (Respondents) (Terminated)

0271-09-ES: London Roof Truss Inc. (Applicant) v. Wazim Fakira and, Director of Employment Standards (Respondents) (Withdrawn)

0296-09-ES: Reliable Book Binders Limited (Applicant) v. Mike Gould and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0585-09-ES: Wild Organic Way Cafe Inc. (Applicant) v. Susan Prior and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0674-09-ES: Vicky De Caria (Applicant) v. First Steps Fertility Inc. and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0700-09-ES: Michael J. Royal (Applicant) v. Optilinx Systems Inc. and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0764-09-ES: Rick Bartlett, a director of Straight Arrow Holdings (Cambridge) Inc. o/a Sign-A-Rama (Applicant) v. Christopher Jones and, Director of Employment Standards (Respondents) (Terminated)

0781-09-ES: Shahbaz Rashidi (Applicant) v. Young Street Group Ltd. and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0787-09-ES: Buy Great Autos Ltd. (Cantel Marketing) (Applicant) v. Huntley Richardson and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0798-09-ES: Idea Thinkers (Applicant) v. Diane Pedreira,, Carly Yaroski,, Sarinee Sarkissian and, Director of Employment Standards (Respondents) (Terminated)

0827-09-ES: Keung Ho and Sho Tang Chen, Directors of 1031268 Ontario Inc. o/a Neon Gas Station (Applicant) v. Minjie Lou and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0899-09-ES: Marc Cyr o/a Marc Cyr Roofing and/or Traces Inc. (Applicant) v. Thomas Postma and, Director of Employment Standards (Respondents) (Terminated)

0913-09-ES: 1336568 Ontario Inc. o/a Thamesford Pizza Company (Applicant) v. Tina Nemeth and, Director of Employment Standards (Respondents) (Withdrawn)

0938-09-ES: Shui-Chun Lui (Applicant) v. 1125154 Ontario Limited o/a Yee Hong Rehabilitation Centre Limited Partnership, Director of Employment Standards (Respondents) (Endorsed Settlement)

0946-09-ES: Vigneswary Premanathan (Applicant) v. Holiday Home Fashions Inc. and, Director of Employment Standards (Respondents) (Endorsed Settlement)

0951-09-ES: Ducana Windows & Doors Ltd. (Applicant) v. Patricia Marchand, Director of Employment Standards (Respondents) (Endorsed Settlement)

0954-09-ES: Peter Dzieciol (Applicant) v. Don Valley North Automotive Inc. and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1022-09-ES: Greenlane Landscaping & Snow Removal Inc. (Applicant) v. Juliana Cozma and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1023-09-ES: 1361120 Ontario Limited, 22 Church Steakhouse (Applicant) v. Elizabeth Stovel, Director of Employment Standards (Respondents) (Terminated)

1041-09-ES: Ventra Plastics Co. o/a Ventra Plastics (Applicant) v. Celine Cipolla and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1044-09-ES: Adriana Breman (Applicant) v. 552702 Ontario Inc. o/a Fayez Beauty Spa and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1061-09-ES: Jamie Jarvis (Applicant) v. J. D. McArthur Tire Services Inc., Director of Employment Standards (Respondents) (Endorsed Settlement)

1164-09-ES: John C. Moore (Applicant) v. Williams Coffee Pub, and, Director of Employment Standards (Respondents) (Terminated)

1170-09-ES: Marcien Amrr Ochba (Applicant) v. Amanda Teixiera, Razia Ismatuallah and, Director of Employment Standards (Respondents) (Terminated)

1171-09-ES: Canadian Tire Cobourg (Applicant) v. Corey Ouellette, and, Director of Employment Standards (Respondents) (Terminated)

1293-09-ES: Terence Dahle (Applicant) v. J.G. Barrette Electric Ltd. and, Director of Employment Standards (Respondents) (Dismissed)

1301-09-ES: Rodolfo Reda (Applicant) v. Fleming Fast Freight Inc. and, Director of Employment Standards (Respondents) (Withdrawn)

1330-09-ES: Kennedy Automation Limited (Applicant) v. Robert Sine, Director of Employment Standards (Respondents) (Terminated)

1337-09-ES: Intercede (Applicant) v. Columbia Diaz and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1340-09-ES: Desmond McLennon (Applicant) v. Associated Toronto Taxi-Cab Co-operative Limited and, Director of Employment Standards (Respondents) (Endorsed Settlement)

1390-09-ES: Turf Operations Scarborough Inc. (Applicant) v. John Surkos and, Director of Employment Standards (Respondents) (Withdrawn)

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

3241-08-HS: Cayuga Asphalt & Construction, a Business Unit of St. Lawrence Cement Inc. (Applicant) v. international Union of Operating Engineers (IUOE)- Local 793 and, Labourers' International Union of North America, (LIUNA) - Local 837 and, Paul Malboeuf – Inspector (Respondents) (Withdrawn)

0068-09-HS: Toronto Transit Commission (Applicant) v. Amalgamated Transit Union, Local 113 and, Joel Magnan, Inspector (Respondents) (Withdrawn)

0554-09-HS: Ricco Food Distributors Corp. (Applicant) v. Linda Clarke, Inspector, Bill Hannan, Dave Thompson, Joe Milhomas (Respondents) (Withdrawn)

0624-09-HS: Border Steel Ltd. (Applicant) v. Workers of Border Steel Ltd. and, John Lepera, Inspector (Respondents) (Withdrawn)

0796-09-HS: Toronto Transit Commission (Applicant) v. Amalgamated Transit Union Local 113, Gloria Bergen, Inspector (Respondents) (Withdrawn)

1066-09-HS: TWD Roads Management Inc. (Applicant) v. international Union of Operating Engineers, Local 793 and, Thomas McKay, Inspector (Respondents) (Dismissed)

1137-09-HS: Bruce Power (Applicant) v. Worker Co-Chair of Joint Health and Safety Committee, Power Workers' Union, Society of Energy Professionals, Kevin Deneve, Inspector (Respondents) (Dismissed)

1313-09-HS: Bruce Power (Applicant) v. Worker Co-Chair of Joint Health and Safety Committee, Power Workers' Union, Society of Energy Professionals and, Kevin Deneve, Inspector (Respondents) (Granted)

FIRST AGREEMENT - DIRECTION

3643-08-FC: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. The Toronto Humane Society (Respondent) (Withdrawn)

PAY EQUITY ACT

0543-07-PE: The Municipality of North Perth (Applicant) v. Cynthia Moyer (Respondent) (Endorsed Settlement)

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

0093-08-PS: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Health Care, London and, Canadian Mental Health Association Elgin Branch (Respondents) (Withdrawn)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2922-08-ES: Leo Patrick McElhone, a Director of Contran Manufacturing (1982) Limited (Applicant) v. Wayne Martin, Robert Rose, Michael Lewis, Michael Langford, Kyle Tallman, Mark Leeper, Ron Pellerin, Lee Grant, Michael Cripps, Barbara Calvert, Sandy Martin, Ian Vella, Teresa Castillo, John DeBeck and, Director of Employment Standards, Matthew Maynard, Keith Monk, Steve Gibson, James Honsinger, Verlyn Lanning, Terry Vannatter, Paul Cushman, Laura Gillespie, Timothy Caudle, John Gillespie, Peter Cyr (Respondents) (Dismissed)

CASE LISTINGS SEPTEMBER 2009

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 2009

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2599-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Horizon Concrete Forming Inc. (Respondent)

Unit: "all construction labourers in the employ of Horizon Concrete Forming Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3860-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. HSE Integrated Ltd. (Respondent)

Unit: "all construction labourers in the employ of HSE Integrated Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of HSE Integrated Ltd., in all sectors of the construction industry in the Counties of Essex and Kent and the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non working foremen and persons above the rank of non working foreman" (6 employees in unit)

1062-09-R: Christian Labour Association of Canada (Applicant) v. Good Mechanical Contractors, a division of 524556 Ontario Inc. (Respondent)

Unit: "all journeyman and apprentice plumbers and construction labourers in the employ of the Good Mechanical Contractors, a division of 524556 Ontario Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, save and except non-working foremen, persons above the rank of non working foreman, and sales and office staff" (12 employees in unit)

1180-09-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fairview Electric Contractors Limited (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Fairview Electric Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Fairview Electric Contractors Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1400-09-R: International Union of Operating Engineers, Local 793 (Applicant) v. 667589 Ontario Inc. (operating as North Point Services) and/or, Eastview Developments Limited and/or, PML Traders Ltd. (Respondents)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of 667589 Ontario Inc. (operating as North Point Services) and/or Eastview Developments Limited and/or PML Traders Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of 667589 Ontario Inc. (operating as North Point Services) and/or Eastview Developments Limited and/or PML Traders Ltd. in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (3 employees in unit)

1506-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wild Wing Restaurants Inc. , Restaurant Supply Group Inc. (Respondents)

Unit: "all carpenters and carpenters' apprentices in the employ of Wild Wing Restaurants Inc. and Restaurant Supply Group Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Wild Wing Restaurants Inc. and Restaurant Supply Group Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1509-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1554264 Ontario Limited (Respondent)

Unit: "all construction labourers in the employ of 1554264 Ontario Limited in all sectors of the construction industry in the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

1525-09-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. 1762706 Ontario Inc. c/o Business as Earthworks (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 1762706 Ontario Inc. c/o Business as Earthworks in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of 1762706 Ontario Inc. c/o Business as Earthworks in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1587-09-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Piddi Design (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Piddi Design in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Piddi Design in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (2 employees in unit)

1594-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C&S Contractors Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of C&S Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of C&S Contractors Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1637-09-R: Canadian Construction Workers' Union (Applicant) v. Kingsdale Bayview Estates Limited, and/or, Luxor Construction Corporation (Respondents)

Unit: "all construction labourers in the employ of Kingsdale Bayview Estates Limited and/or Luxor Construction Corporation in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1655-09-R: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Paag Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Paag Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Paag Electric Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to Vote

4107-06-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. TWD Roads Management Inc. (Respondent)

Unit: "all employees of TWD Roads Management Inc. employed at or out of the townships of Oro-Medonte and Ramara, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff." (20 employees in unit) *(Having regard to the agreement of the parties.)(Clarity Note)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	8

2800-08-R: International Association of Machinists and Aerospace Workers (Applicant) v. Ontario Patient Transfer (Respondent)

Unit: "all employees of Ontario Patient Transfer based in the City of Hamilton working in and out of the City of Hamilton, save and except dispatchers, garage staff, office and clerical staff, supervisors and persons above the rank of supervisor" (95 employees in unit)

Number of names of persons on revised voters' list	98
Number of persons who cast ballots	66
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	66
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	53
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	0

3351-08-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Indicom Electric Contracting Limited (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Indicom Electric Contracting Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Indicom Electric Contracting Limited in all sectors of the construction industry excluding the industrial, commercial and institutional sector, in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	0

1324-09-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Hilldale Retirement Living Ltd. (Respondent)

Unit: "all employees of Hilldale Retirement Living Ltd., in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisors and those persons covered by Section 1(3)b of the Labour Relations Act" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12

Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

1371-09-R: Ontario Public Service Employees Union and (Applicant) v. American Water Canada Corp. (Respondent)

Unit: "all employees of American Water Canada Corp. in the municipality of Middlesex Centre and Dorchester in the Municipality of Thames Centre save and except supervisors and those above the rank of supervisor" (7 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	2

1381-09-R: Canadian Union of Public Employees (Applicant) v. Women's Own Withdrawal Management (University Health Network) (Respondent)

Unit: "all employees at Women's Own Withdrawal Management Centre, (University Health Network) at 892 Dundas Street which is in the City of Toronto save and except supervisors, coordinators, administrative assistants, and those covered under a current Collective Agreement" (22 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	7

1396-09-R: UFCW Canada (Applicant) v. LensCrafters International, Inc. (Respondent)

Unit: "all employees of LensCrafters International, Inc. located at 220 Yonge Street (Level 4) of the Toronto Eaton Centre, save and except General Manager, Retail Manager, Lab Manager, Sales Supervisor and persons above the rank of Sales Supervisor" (13 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	2

1432-09-R: Sheet Metal Worker's International Association Local 540 (Applicant) v. ASL (Tomkins) Inc. (Respondent)

Unit: "all employees of ASL (Tomkins) Inc. in the Province of Ontario save and except forepersons and persons above the rank of foreperson, office, clerical and sales staff" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1471-09-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Auto Warehouse Company Canada Limited AKA: Gen-Auto Shippers (Respondent)

Unit: "all employees of Auto Warehousing Company Canada Limited in Oshawa, Windsor and Ingersoll, Ontario save and except supervisor, those above the rank of supervisor, office staff, sales staff, security guards, janitors, watchmen and stockmen who are presently excluded; which janitors are watchperson are used exclusively in these categories of work" (626 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	19
Number of ballots segregated and not counted	0

1486-09-R: Service Employees International Union Local 1 Canada (Applicant) v. 2110907 Ontario Ltd. o/a Hampton Inn and Suites, Barrie (Respondent)

Unit: "all employees of 2110907 Ontario Ltd. o/a Hampton Inn and Suites, Barrie in the City of Barrie save and except supervisor, persons above the rank of supervisor" (22 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	0

1495-09-R: Power Workers' Union CUPE Local 1000-CLC (Applicant) v. Sodexo Canada Ltd. (Respondent)

Unit: "all employees of Sodexo Canada Ltd. employed at the Darlington Nuclear Generating Station and associated buildings, Holt Road South in the City of Bowmanville, save and except Unit Director, Office Manager, Catering Manager, Executive Chef, persons above the rank of Supervisor and Employees in bargaining units for which any trade union held bargaining rights as of August 26, 2009" (4 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1550-09-R: Ontario Workers' Union (Applicant) v. Call of the Wild Inc. (Respondent)

Unit: "all employees of Call of the Wild Inc. at its Bracebridge operation, save except supervisors and persons above this rank" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

Number of ballots segregated and not counted	0

1583-09-R: Canadian Union of Public Employees (Applicant) v. Hastings Children's Aid Society (Respondent)

Unit: "all supervised access workers and night duty workers employed at Hastings Children's Aid Society in Hastings County, save and except supervisors and persons above the rank of supervisor and those persons already covered by a Collective Agreement" (10 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1588-09-R: The Ontario Nurses' Association (Applicant) v. The Westmount Long Term Care Residence (Respondent)

Unit: "all Registered Nurses and Nurses with temporary Certificate of Registration employed by The Westmount Long Term Care Residence, Kitchener, save and except the Director of Care and persons above the rank of Director of Care" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1599-09-R: Service Employees International Union Local 1 Canada (Applicant) v. Caledon Community Services (Respondent)

Unit: "all employees of Caledon Community Services working in supportive housing, Team Leaders, save and except supervisor, persons above the rank of supervisor and office and clerical" (37 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	5

Applications for Certification Dismissed Without Vote

2356-06-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Aramark Canada Facilities Services Limited (Respondent)

1576-08-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Reliance Construction (Ontario) Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

4108-06-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. TWD Roads Management Inc. (Respondent)

Unit: "all employees of TWD Roads Management Inc. at or out of the City of Barrie, the Township of Springwater, and the Township of Clearview, Ontario, save and except office, clerical and sales employees" (22 employees in unit)

0325-09-R: Teamsters Local Union No. 419 (Applicant) v. Millard Refrigerated Services, Inc. Respondent)

Unit: "all employees of Millard Refrigerated Services Inc. and/or Millard Refrigerated Services Canada, ULC in the Regional Municipality of Peel, save and except supervisors, persons above the rank of supervisor, and sales staff." (58 employees in unit)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	71
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	58
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	39
Number of ballots segregated and not counted	13
Number of ballots segregated and not counted	0

1407-09-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Alta Vista Manor Inc. (Respondent)

Unit: "all employees of Alta Vista Manor Inc. employed at 751 Peter Morand Crescent, Ottawa, ON, K1G 6S9, save and except supervisors and persons above the rank of supervisor." (97 employees in unit)

Number of names of persons on revised voters' list	117
Number of persons who cast ballots	95
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	70
Number of segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	16

Number of ballots marked against applicant	68
Number of ballots segregated and not counted	9

Applications for Certification Withdrawn

2965-07-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pioneer Construction Inc. (Respondent) v. Northern Construction Workers' Union, Teamsters Local Union No. 230 (Interveners)

2895-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Fred Groenestege Construction Ltd., FCG Limited and FGC Construction Ltd. (Respondent) v. Murray Elliott (Intervener)

3755-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Quinan Construction Limited (Respondent)

0629-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rejean Guindon Construction Corporation (Respondent)

1584-09-R: International Union of Bricklayers & Allied Craftworkers, Local 7 (Applicant) v. Brigil Construction Inc. / Le Groupe Brigil Construction (Respondent)

1708-09-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Knight Facilities Management, Inc. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2983-06-R: Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newsmedia Guild (Applicant) v. Sun Media Corporation;, Sun Media (Toronto) Corporation;, The London Free Press, A Division of Sun Media Corporation; and, Sun Media Corporation c.o.b. as The Ottawa Sun (Respondents) *(Granted)*

3211-07-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. 770224 Ontario Inc. o/a NGP Contractors and, N.K. & Sons General Contractors Ltd. (Respondents) *(Withdrawn)*

3589-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. John Giardullo c.o.b. as Braidwood Homes, Braidwood Developments Ltd. c.o.b. as Braidwood Homes, Braidwood Homes (Richmond Hill) Inc. c.o.b. as Braidwood Homes, Samgard Holdings Inc. , Plan 1203 Orillia Holdings Inc. and, Monopoly Commercial Realty Inc. c.o.b. as Monopoly Developments (Respondents) *(Withdrawn)*

2390-08-R: Labourers' International Union of North America, Local 247 and, Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Valeira Construction Ltd. and, H.V. Construction Limited (Respondents) *(Withdrawn)*

3375-08-R: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. Smid Construction Limited, Wall-Tech Restoration Inc. (Respondents) *(Withdrawn)*

0040-09-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. National Millwork Company Limited, National Millwork Inc. (Respondents) *(Endorsed Settlement)*

0503-09-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 2153743 Ontario Limited, 2191434 Ontario Limited and, Robert Nicli (Respondents) *(Dismissed)*

0923-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America on behalf of itself and its constituent trade unions Local 27 and Local 397 (Applicant) v. Salwood General Contractors Inc.,, 1660434 Ontario Inc. and, Domenic

Loschiavo o/a Starwood General Contractors Inc. (an unregistered business name), I.C. Interiors and, Domenic Loschiavo o/a I.C. Project Management (an unregistered business name) (Respondents) *(Granted)*

SALE OF A BUSINESS

2983-06-R: Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newsmedia Guild (Applicant) v. Sun Media Corporation;, Sun Media (Toronto) Corporation;, The London Free Press, A Division of Sun Media Corporation; and, Sun Media Corporation c.o.b. as The Ottawa Sun (Respondents) *(Granted)*

3211-07-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. 770224 Ontario Inc. o/a NGP Contractors and, N.K. & Sons General Contractors Ltd. (Respondents) *(Withdrawn)*

3589-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. John Giardullo c.o.b. as Braidwood Homes, Braidwood Developments Ltd. c.o.b. as Braidwood Homes, Braidwood Homes (Richmond Hill) Inc. c.o.b. as Braidwood Homes, Samgard Holdings Inc. , Plan 1203 Orillia Holdings Inc. and, Monopoly Commercial Realty Inc. c.o.b. as Monopoly Developments (Respondents) *(Withdrawn)*

2390-08-R: Labourers' International Union of North America, Local 247 and, Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Valeira Construction Ltd. and, H.V. Construction Limited (Respondents) *(Withdrawn)*

3375-08-R: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. Smid Construction Limited, Wall-Tech Restoration Inc. (Respondents) *(Withdrawn)*

0040-09-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. National Millwork Company Limited, National Millwork Inc. (Respondents) *(Endorsed Settlement)*

0503-09-R: Labourers' International Union of North America, Local 1059 (Applicant) v. 2153743 Ontario Limited, 2191434 Ontario Limited and, Robert Nicli (Respondents) *(Dismissed)*

0767-09-R: Service de transport Francobus (Applicant) v. Fédération des enseignantes et des enseignants des écoles secondaires de l'Ontario et son unité locale 58 (Respondent) *(Granted)*

0923-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America on behalf of itself and its constituent trade unions Local 27 and Local 397 (Applicant) v. Salwood General Contractors Inc., 1660434 Ontario Inc. and, Domenic Loschiavo o/a Starwood General Contractors Inc. (an unregistered business name), I.C. Interiors and, Domenic Loschiavo o/a I.C. Project Management (an unregistered business name) (Respondents) *(Granted)*

1574-09-R: The Ontario Secondary School Teachers' Federation (OSSTF) (Applicant) v. The Renfrew County District School Board and, The Airy and Sabine District School Area Board (Respondents) *(Withdrawn)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0369-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jeffrey Wayne Pankhurst c.o.b. Webuild and, Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Respondents) *(Withdrawn)*

1292-09-R: Muriel Allen (Applicant) v. UNITE HERE Ontario Council or Workers United Ontario Council (Respondent) v. Niyan Properties c.o.b. Comfort Inn (Intervener)

Unit: "all employees in the City of Cornwall, save and except assistant managers, persons above the rank of assistant manager and students during the school vacation" (23 employees in unit) *(Granted)*

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	21
Number of ballots segregated and not counted	0

1312-09-R: Ferro-Fab Inc. (formerly Capital Disposal Equipment 2001 Ltd.) (Applicant) v. United Steelworkers Local 3950 (Respondent) *(Withdrawn)*

1328-09-R: Workers United Ontario Council (Applicant) v. United Food and Commercial Workers International Union and/or, United Food and Commercial Workers International Union, Local 102 (Respondents) v. Hospitality Resorts Inc. (Intervener) *(Withdrawn)*

1341-09-R: Donna Marsh (Applicant) v. Workers United Ontario Council and its Local 2347 or UNITE HERE Ontario Council and its Local 2347 (Respondent) v. Comfort Inn HOCO Limited (Intervener)

Unit: "all employees of Hoco Limited normally and regularly performing work at the Comfort Inn within the following classifications: room attendants, house persons, janitors and bellpersons, save and except part-time employees" (26 employees in unit) *(Dismissed)*

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	17
Number of ballots marked against respondent	7
Number of ballots segregated and not counted	0

1370-09-R: Toni Clouston (Applicant) v. Teamsters Local Union 91 (Respondent) *(Withdrawn)*

Unit: "all taxi cab drivers employed by, or dependent contractors of Aye Company Limited o/a Central Taxi, working in and out of the City of Belleville (hereinafter termed "taxi drivers"), save and except supervisors, persons above the rank of supervisor, coordinators, mechanics, dispatchers, part-time dispatchers, salesmen and office and clerical staff." (50 employees in unit)

Number of names of persons on revised voters' list	78
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	19

Number of ballots marked against respondent	16
Number of ballots segregated and not counted	7

1417-09-R: Lynn McIlroy (Applicant) v. Kingston Typographical Union, Local 30204 (Respondent) v. The Kingston Whig-Standard (Intervener)

Unit: "all employees of The Kingston Whig-Standard in Kingston regularly employed for not more than twenty-four hours per week in the Advertising, and Reader Sales Departments and the Business office, save and except supervisors, payroll clerks, persons above the rank of supervisor and students employed during the school vacation periods." (2 employees in unit) *(Granted)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

1597-09-R: MN Electric Company Ltd. Employees (Applicant) v. IBEW Local 353 (Respondent) *(Dismissed)*

1826-09-R: Philip Larocque, Beth Pelton, Allana Sullivan and Anne Marie Batten (Applicant) v. Canadian Union of Public Employees and its Local 4308 (Respondent) v. Street Health Community Nursing Foundation (Intervener) *(Dismissed)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1634-09-U: Melloul-Blamey Construction Inc. (Applicant) v. Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, United Brotherhood of Carpenters and Joiners of America, Local Union 675, Claudio Mazzotta, Tony Bucci, Jozo Krizanac (Respondents) *(Endorsed Settlement)*

1762-09-U: Melloul-Blamey Construction Inc. (Applicant) v. Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, United Brotherhood of Carpenters and Joiners of America, Local Union 675, Claudio Mazzotta, Tony Bucci, Jozo Krizanac (Respondents) *(Terminated)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3938-07-U: Amalgamated Transit Union Local 966 (Applicant) v. The Corporation of the City of Thunder Bay (Respondent) *(Withdrawn)*

1114-08-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Deluca Roofing Inc. (Respondent) *(Withdrawn)*

2068-08-U: Lafarge Canada Inc. (Applicant) v. United Steelworkers, Local 1-2693 (Respondent) *(Withdrawn)*

2180-08-U: Carole Demontigny (Applicant) v. United Food & Commercial Workers Canada, Local 175 (Respondent) v. 962600 Ontario Inc. o/a Landriault's Your Independent Grocer (Y.I.G.) (Intervener) *(Withdrawn)*

2181-08-U: Chris Inch (Applicant) v. International Brotherhood of Electrical Workers, Local 773 (Respondent) *(Dismissed)*

2236-08-U: Labourers' International Union of North America, Local 527 (Applicant) v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765, Bétons Préfabriqués du Lac Inc. (Respondents) *(Dismissed)*

2387-08-U; 0093-09-U: Canadian Union of Public Employees and its Local 4000 (Applicant) v. Travois Medical Transfer (Respondent) *(Withdrawn)*

2620-08-U: Guy Laporte (Applicant) v. Canadian Union of Public Employees and its Local 4258 (Respondent) v. Couvent Mont-Saint-Joseph, SCO (Intervener) *(Withdrawn)*

2904-08-U: Universal Workers Union, L.I.U.N.A, Local 183 (Applicant) v. The Toronto Humane Society (Respondent) *(Withdrawn)*

2905-08-U: Universal Workers Union, L.I.U.N.A, Local 183 (Applicant) v. The Toronto Humane Society (Respondent) *(Withdrawn)*

2913-08-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Fred Groenestege Construction Ltd., FGC Limited and FGC Construction Ltd. , FGC Limited, FGC Construction Ltd. (Respondents) *(Withdrawn)*

2979-08-U: Universal Workers Union, L.I.U.N.A, Local 183 (Applicant) v. The Toronto Humane Society (Respondent) *(Withdrawn)*

3017-08-U: Darren S. Hickin (Applicant) v. National Automobile, Aerospace, Transportation, and General Workers Union of Canada (CAW-Canada) and its Local 1987 (Respondent) *(Dismissed)*

3053-08-U: Universal Workers Union, L.I.U.N.A, Local 183 (Applicant) v. The Toronto Humane Society (Respondent) *(Withdrawn)*

3060-08-U: International Association of Machinists and Aerospace Workers (Applicant) v. Ontario Patient Transfer (Respondent) *(Withdrawn)*

3192-08-U: Retail, Wholesale and Department Store Union, District Council of the United Food and Commercial Workers International Union (Applicant) v. 2150149 Ontario Inc. (c.o.b. as Super 8 North Bay) (Respondent) *(Withdrawn)*

3305-08-U: Tony Da Costa (Applicant) v. Labourers' International Union of North America, Local 1081 (Respondent) *(Dismissed)*

3409-08-U: Arlene Bertola (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 571-0 (Respondent) v. United Food and Commercial Workers Union, Local 175 (Intervener) *(Dismissed)*

3512-08-U: Doug Laframboise (Applicant) v. The Society of Energy Professionals Local 160 of The International Federation of Professional and Technical Engineers (Respondent) v. Inergi LP (Intervener) *(Dismissed)*

3620-08-U: Nick Colantonio (Applicant) v. Canadian Union of Public Employees and its Local 1280 (Respondent) v. Toronto Catholic District School Board (Intervener) *(Withdrawn)*

3762-08-U: Universal Workers Union, L.I.U.N.A, Local 183 (Applicant) v. The Toronto Humane Society (Respondent) *(Withdrawn)*

3765-08-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Quinan Construction Limited (Respondent) *(Withdrawn)*

0165-09-U: Daniel Richard Ward (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) *(Withdrawn)*

0282-09-U: Hollis R. Eddison (Applicant) v. United Steelworkers, Local 1-2693 (Respondent) *(Dismissed)*

0335-09-U: Service Employees International Union Local 1 Canada (Applicant) v. VON Canada Ontario Branch (Respondent) *(Withdrawn)*

0370-09-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jeffrey Wayne Pankhurst c.o.b. Webuild and, Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Respondents) *(Withdrawn)*

0438-09-U: Ontario Public Service Employees Union (Applicant) v. Liquor Control Board of Ontario (Respondent) *(Withdrawn)*

0737-09-U: Julie Gallinger (Applicant) v. Canadian Union of Public Employees and its Local 7811 (Respondent) *(Dismissed)*

0777-09-U: Ronald Douglas Clark (Applicant) v. United Food and Commercial Workers Union Local 333 (Respondent) v. G4S Security Services (Canada) Ltd. (Intervener) *(Dismissed)*

0834-09-U: Mahassen Mahmoud (Applicant) v. Canadian Union of Public Employees and its Local 3393 (Respondent) *(Teminated)*

0994-09-U: Angela St. Micheal (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) v. London District Catholic School Board (Intervener) *(Withdrawn)*

0996-09-U; 0997-09-U: CAW Local 1256 (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and, Magna International Inc. (Respondents); Tom Cameron and CAW Local 1256 (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) v. Mississauga Seating Systems (Intervener) *(Withdrawn)*

1027-09-U: Canadian Union of Public Employees and its Local 2717 (Applicant) v. St. Joseph's Continuing Care Centre (Respondent) *(Withdrawn)*

1088-09-U: Wendy Richards (Applicant) v. CAW Local 4212 (Respondent) *(Dismissed)*

1104-09-U: Lucy Williams-Woods (Applicant) v. UNITE HERE Local 75 (Respondent) *(Withdrawn)*

1152-09-U: United Food and Commercial Workers Union Local 333 (Applicant) v. G4S Security Service Canada Ltd. and, Liquor Control Board of Ontario and, Chris Tait (Respondents) *(Withdrawn)*

1185-09-U: Klaus Wiesner (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 414 (Respondent) v. Metro Ontario Inc. (Intervener) *(Withdrawn)*

1199-09-U: Liberato Lanaca (Applicant) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Respondent) v. Hurley Corporation (Intervener) *(Withdrawn)*

1261-09-U: Concetto Cicciarella (Applicant) v. Graphic Communications/International Brotherhood of Teamsters Union Local 100-M (Respondent) v. Atlantic Packaging (Intervener) *(Withdrawn)*

1296-09-U: Colin Walters (Applicant) v. Sheprott K9 Security (Respondent) *(Withdrawn)*

1434-09-U: International Union of Elevator Constructors, Local 50 (Applicant) v. City Elevator Company Limited (Respondent) *(Withdrawn)*

1440-09-U: Lise Chicoine (Applicant) v. Airline Central Lodge 2323 (Respondent) *(Withdrawn)*

1446-09-U: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Colombus Aluminum and Roofing Ltd. (Respondent) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener) *(Withdrawn)*

1491-09-U: Joan Golding (Applicant) v. Teamsters Local Union No. 879 (Respondent) *(Dismissed)*

1536-09-U: Jennifer Vella (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. Humber River Regional Hospital (Intervener) *(Withdrawn)*

1540-09-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Metropolitan Maintenance (Respondent) *(Withdrawn)*

1698-09-U: Teena McIntosh (Applicant) v. CUPE Local 973 (Respondent) *(Withdrawn)*

1763-09-U: Melloul-Blamey Construction Inc. (Applicant) v. Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, United Brotherhood of Carpenters and Joiners of America, Local Union 675, Claudio Mazzotta, Tony Bucci, Jozo Krizanac (Respondents) *(Teminated)*

APPLICATION FOR INTERIM ORDER

0283-09-M: Roger S. Fontaine (Applicant) v. The Queen in Right of Ontario (Ministry of Labour) and Candys Ballanger-Michaud Director Northern Region (Respondent) *(Withdrawn)*

FINANCIAL STATEMENT

1359-09-M: Debbie Oldfield, Linda Newman, Daniela Scarpelli, Danny Scheibli (Applicant) v. Canadian Staff Union (Respondent) *(Withdrawn)*

JURISDICTIONAL DISPUTES

0966-04-JD: Babcock & Wilcox Industries Ltd. (Applicant) v. Labourers' International Union of North America, Local 837 ("Labourers"); and, The Ontario Provincial Conference of the International Union of Brick and Allied Craftworkers and its Local 1 and Local 4 ("Bricklayers") (Respondents) *(Terminated)*

1125-08-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Applicant) v. George A. Kelson Ltd., International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondents) *(Dismissed)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3014-08-M: Canadian Union of Public Employees and its Local 4448 (Applicant) v. The Municipality of North Middlesex (Respondent) *(Granted)*

0385-09-M: Ottawa Carleton Public Employees Union, Local 503, CUPE (Applicant) v. City of Ottawa (Respondent) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3786-08-OH: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. The Toronto Humane Society (Respondent) *(Withdrawn)*

0284-09-OH: Roger S. Fontaine (Applicant) v. The Queen in Right of Ontario (Ministry of Labour) and Candys Ballanger-Michaud Director Northern Region (Respondent) *(Withdrawn)*

0874-09-OH: Roomina Merali (Applicant) v. CapGemini Canada (Respondent) v. TEK Staff IT Solutions Inc. (Intervener) *(Withdrawn)*

1365-09-OH: Nelson Machado (Applicant) v. UWG Global Inc. (Respondent) *(Withdrawn)*

1627-09-OH: Carlos Vidreiro (Applicant) v. Peel Regional Paramedic Services (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

0276-03-G: Labourers' International Union of North America, Local 837 (Applicant) v. Babcock and Wilcox Canada (Respondent) *(Terminated)*

2726-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. 698806 Ontario Limited c.o.b. as Gap Construction (Respondent) *(Granted)*

3212-07-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. 770224 Ontario Inc. o/a NGP Contractors and, N.K. & Sons General Contractors Ltd. (Respondents) *(Withdrawn)*

3590-07-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. John Giardullo c.o.b. as Braidwood Homes, Braidwood Developments Ltd. c.o.b. as Braidwood Homes, Braidwood Homes (Richmond Hill) Inc. c.o.b. as Braidwood Homes, Samgard Holdings Inc. , Plan 1203 Orillia Holdings Inc. and, Monopoly Commercial Realty Inc. c.o.b. as Monopoly Developments (Respondents) *(Withdrawn)*

0776-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. Nicholson & Hall Corporation (Respondent) v. Communications, Energy and Paperworkers Union of Canada, Local 866 (Intervener) *(Withdrawn)*

0829-08-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Otis Canada Inc (Respondent) *(Granted)*

1580-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. PCL Constructors Canada Inc. (Respondent) *(Withdrawn)*

3096-08-G: Resilient Flooring Contractors' Association of Ontario (Applicant) v. Carpenters and Allied Workers, Local 494 United Brotherhood of Carpenters and Joiners of America (Respondent) v. Windsor Construction Association (Intervener) *(Withdrawn)*

3394-08-G: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. Smid Construction Limited, Wall-Tech Restoration Inc. (Respondents) *(Withdrawn)*

3645-08-G: Teamsters Local Union No. 230, Affiliated with the International Union of Teamsters (Applicant) v. B. Gottardo Construction Ltd. (Respondent) *(Withdrawn)*

0009-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Titan Exteriors Inc. (Respondent) *(Endorsed Settlement)*

0723-09-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. B-Style Concrete Group Corp. and, Bogdan Tkach (Respondents) *(Endorsed Settlement)*

0847-09-G: Ekum-Sekum Incorporated operating as Brantco Corporation (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) *(Dismissed)*

0922-09-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Salwood General Contractors Inc.,, 1660434 Ontario Inc. and, Domenic Loschiavo o/a Starwood General Contractors Inc. (an unregistered business name), I.C. Interiors and, Domenic Loschiavo o/a I.C. Project Management (an unregistered business name) (Respondents) *(Granted)*

0983-09-G: Universal Workers Union, Labourers' International Union of North America, Local 183, Bricklayers, Masons Independent Union of Canada Local 1, Masonry Council of Unions Toronto and Vicinity (Applicants) v. Westoak Masonry Inc. (Respondent) *(Granted)*

1093-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sterling Electrical Contractors Inc. (Respondent) *(Granted)*

1217-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Terra Construction Ltd./Terra Structures Inc. (Respondent) *(Endorsed Settlement)*

1236-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1210166 Ontario Inc. o/a DCC Carpentry and/or 593601 Ontario Inc. o/a DCC Carpentry (Respondent) *(Endorsed Settlement)*

1249-09-G: The International Union of Painters and Allied Trades, Local Union 114 Applicant) v. Meteor Painters & Contractors (Canada) Ltd. (Respondent) *(Endorsed Settlement)*

1254-09-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Strabag Inc. (Respondent) *(Withdrawn)*

1355-09-G: International Brotherhood of Electrical Workers Electrical Power Council of Ontario (Applicant) v. E.S. Fox Limited (Respondent) *(Withdrawn)*

1404-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 2063045 Ontario Ltd. o/a Biasutti Drywall Services Ltd. (Respondent) *(Withdrawn)*

1412-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Triple A Concrete & Drain (Respondent) *(Withdrawn)*

1413-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. Bartech Rigging & Machinery Movers Inc. (Respondent) *(Withdrawn)*

1414-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. Lambton Metal Service (Respondent) *(Granted)*

1415-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Locals 721 and 736 (Applicant) v. Bulldog Rebar (Respondent) *(Granted)*

1416-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. AMF All Metal Fabricating Ltd. (Respondent) *(Granted)*

1422-09-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. The King All Services Inc. (Respondent) *(Granted)*

1423-09-G: Labourers' International Union of North America, Local 506 (Applicant) v. McKay-Cocker Construction Ltd. (Respondent) *(Terminated)*

1438-09-G: International Association of Heat and Frost Insulators and Allied Workers, Local 95 (Applicant) v. Insulcana Contracting Ltd. (Respondent) v. The Master Insulators' Association of Ontario Inc. (Intervener) *(Terminated)*

1449-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. C.F. Concrete & Drain Inc. (Respondent) *(Endorsed Settlement)*

1460-09-G; 1461-09-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Verdi Alliance Inc. / Verdi Inc. (Respondent) *(Withdrawn)*

1473-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. and, Oreste Perruzza (Respondents) *(Endorsed Settlement)*

1477-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Terrastone Construction Inc. and, Ron Colucci (Respondents) *(Endorsed Settlement)*

1480-09-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Talic Woodwork Ltd. c.o.b. as Art Woodwork (An unregistered business name) and Danny Talic (Respondent) *(Endorsed Settlement)*

1498-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Fund") (Applicant) v. Ducan Ceiling & Walls Systems of Oshawa Limited (Respondent) *(Endorsed Settlement)*

1502-09-G: International Union of Bricklayers and Allied Craftsmen Local 2/Brick and Allied Craft Union of Canada Local 2 (Applicant) v. Batnor Construction Ltd. (Respondent) *(Endorsed Settlement)*

1505-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Lake Excavating & Contracting Inc. (Respondent) *(Granted)*

1526-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446 Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486, (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds" (Applicant) v. Talic Woodwork Ltd. c.o.b. as Art Woodwork (Respondent) *(Endorsed Settlement)*

1527-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Nova Steel Systems Sudbury Inc. (Respondent) *(Endorsed Settlement)*

1532-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. T C Contracting Inc. (Respondent) *(Granted)*

1533-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Maplecon Earthworks Ltd. (Respondent) *(Granted)*

1554-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. C.C. Construction Site Service Group Inc. (Respondent) *(Granted)*

1589-09-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Grainger Glass Inc. (Respondent) *(Granted)*

1590-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. Maple Industries Inc. (Respondent) *(Granted)*

1591-09-G; 1592-09-G: Canadian Union of Skilled Workers (Applicant) v. Strabag Inc. (Respondent) *(Withdrawn)*

1613-09-G: United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 787 (Applicant) v. General Air Systems Inc. (Respondent) *(Withdrawn)*

1620-09-G: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Cro-Rock Drywall Inc. (Respondent) *(Granted)*

1647-09-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Urban Painting and Decorating Ltd. (Respondent) *(Withdrawn)*

1657-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Raywin Industries Limited (Respondent) *(Granted)*

1661-09-G: The International Union of Painters and Allied Trades, Local Union 200 (Applicant) v. Robert Ouellette c.o.b. Peinture Final Touch (Respondent) *(Granted)*

1666-09-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Clegg Glass (2008) Inc. (Respondent) *(Granted)*

1687-09-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Regional Elevator (Respondent) *(Withdrawn)*

1694-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Edward Kosciuch c.o.b. as All City Drywall (Respondent) *(Withdrawn)*

1759-09-G: The International Union of Painters and Allied Trades, Local Union 1590 (Applicant) v. Abby Services Inc. (Respondent) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

3497-07-ES: Accuworx Inc. (Applicant) v. Director of Employment Standards (Respondent) *(Dismissed)*

2744-08-ES: Hairdesign.Ca Inc. (Applicant) v. Tammy Barkley and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3288-08-ES: Century 21 Specialist Realty Inc. (Applicant) v. Stephanie Silveira, and, Director of Employment Standards (Respondents) *(Terminated)*

3465-08-ES; 3466-08-ES Elizabeth Smith, a Director of Apex Retail Fabrication Inc. (Applicant) v. Joanne Shepherd and, Director of Employment Standards (Respondents); Aaron Hailman, a Director of Apex Retail Fabrication Inc. (Applicant) v. Joanne Shepherd and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3518-08-ES: Luyi Inc. (Applicant) v. Dorothy Whittaker and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3614-08-ES: Antflyck & Aulis LLP (Applicant) v. Nicole Coulstring, Director of Employment Standards (Respondents) *(Granted)*

3630-08-ES: Toronto Community Housing Corporation (Applicant) v. Wade Janes and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3732-08-ES: Madhuvanti Rajaram (Applicant) v. CSEDEV Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

0329-09-ES: Alliance iCommunications Inc. (Applicant) v. Thomas Pinkney and, Director of Employment Standards (Respondents) *(Granted)*

0337-09-ES: Anwar Ahmed (Applicant) v. Sakfa International Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0390-09-ES: A.J. Lanzarotta Wholesale Fruit & Vegetables Ltd. (Applicant) v. James Blair, and, Director of Employment Standards (Respondents) *(Granted)*

0453-09-ES: Gene Lloyd o/a Lloyd's Driver Service (Applicant) v. Gary Hyslop and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0465-09-ES: Gemstar Security Service Ltd. (Applicant) v. Marry Bartucci, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0474-09-ES: Bogar Truck Parts and Service Inc. (Applicant) v. Gary Sampson and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0480-09-ES: Goran Cerovina (Applicant) v. Casino Rama Services Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

0489-09-ES: Leon Parry o/a Subway Sandwiches and Salads (Applicant) v. Janet Boyd and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0602-09-ES: Rivalda Oaks Kitchens (Applicant) v. Salvatore Butera and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0612-09-ES: Halla Climate Control Canada Inc. (Applicant) v. James Davidson and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0659-09-ES: Kenneth Outerbridge (Applicant) v. Shade Oak Swine Ltd. o/a Total Swine Genetics and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0670-09-ES: Ramnarase Rampersad (Applicant) v. Primary Response Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

0718-09-ES: 1543411 Ontario Inc. o/a Willowside Family Restaurant (Applicant) v. Suzanne Sachs and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0735-09-ES: Ming Chu Group Ltd. o/a Beijing Tianrun Restaurant (Applicant) v. Kai Wing Lau and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0751-09-ES: Russell Peter Urbanoski and Maureen Debora Urbanoski, directors of 3761355 Canada Ltd. o/a Canadian Select Farm Foods (Applicant) v. Dameian Singh and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0793-09-ES: Pietrzyk Krzystof c.o.b. KP Waterproofing (Applicant) v. Antoni Wojcik and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0846-09-ES: 1000 Islands Office Products Group Inc. (Applicant) v. Tabitha Comis and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0860-09-ES: Buy-Rite Truck Parts Inc. (Applicant) v. Norman Abrams and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0861-09-ES: Buy-Rite Truck Parts Inc. (Applicant) v. Jeffrey King and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0880-09-ES: Beaucraft Greeting Cards Ltd/2162022 Ont Inc. (Applicant) v. James D. Ketchabaw and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0970-09-ES: Don Perera (Applicant) v. Van-Rob Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0986-09-ES: Mr. Topper's Pizza Limited o/a Topper's Pizza (Applicant) v. Sherry Vardy and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0995-09-ES: Kuntz Electroplating Inc. (Applicant) v. Dave Dubrick and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0999-09-ES: Bulova Watch Company Limited (Applicant) v. Nicole Kovacic and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1024-09-ES: 2056006 Ontario Inc. o/a Zest Bar & Bistro (Applicant) v. Paul David Skilton and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1038-09-ES: Columbia Manufacturing Co. Ltd. (Applicant) v. Director of Employment Standards, Sonia Klampfer (Respondents) *(Endorsed Settlement)*

1051-09-ES: 1172831 Ontario Limited o/a Aden Audio & Electronics & Aden Camera (Applicant) v. Jamie Shepherd and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1070-09-ES: J.K.W. Select Meats Ltd. o/a Grober Inc. (Applicant) v. Ruth Parbhu and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1074-09-ES: Jetmo Inc. o/a Fast Eddies (Applicant) v. Beverly McLean and, Director of Employment Standards (Respondents) *(Withdrawn)*

1101-09-ES: Jie Yi Huang (Applicant) v. Design Plus Products Holdings Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1125-09-ES: David Neufeld (Applicant) v. Greenwood Homes Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

1156-09-ES: John Garcia, a Director of Hardrock Precast Inc. (Applicant) v. Casian Neacsu and, Director of Employment Standards (Respondents) *(Terminated)*

1182-09-ES: Auto-Pak Ltd. (Applicant) v. Barry Weeden and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1230-09-ES: Paul Hecht, Director of Princeton Apartments Ltd. (Applicant) v. Gervend Bajan and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1325-09-ES: Donna Louise Slote o/a Absolutely Sparkling Cleaning Services (Applicant) v. Jennifer Bell and, Director of Employment Standards (Respondents) *(Terminated)*

1331-09-ES: Jaime Cardenas c.o.b. as Cardenas Maintenance (Applicant) v. Luz Stella Meneses Arango and, Director of Employment Standards (Respondents) *(Terminated)*

1360-09-ES: Modern Taxi Cab Limited (Applicant) v. Ross J. Mahaffey and, Director of Employment Standards (Respondents) *(Terminated)*

1397-09-ES: Alan Pettitt (Applicant) v. Spada Lighting and Electrical Maintenance Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1419-09-ES; 1420-09-ES: Travel Sensations Mississauga Inc. (Applicant) v. Anna Frankova-Ahlami and, Director of Employment Standards (Respondents); Travel Sensations Mississauga Inc. (Applicant) v. Anna Todoric and, Director of Employment Standards (Respondents) *(Terminated)*

1453-09-ES: Antonio A. Ayuste, Jr. (Applicant) v. EEJR Electronic Services Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1456-09-ES: Felisia Leontis o/a Atlantic Submarines (Applicant) v. Shelley Gallenger and, Director of Employment Standards (Respondents) *(Terminated)*

1492-09-ES: Shu Qian Li (Applicant) v. Park Tak International Corporation and, Director of Employment Standards (Respondents) *(Terminated)*

1510-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Christine Egan and, Director of Employment Standards (Respondents) *(Terminated)*

1511-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Jason Busch and, Director of Employment Standards (Respondents) *(Terminated)*

1512-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Tom Hearn and, Director of Employment Standards (Respondents) *(Terminated)*

1513-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Clint Cardinal and, Director of Employment Standards (Respondents) *(Terminated)*

1514-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Kathy Nichols and, Director of Employment Standards (Respondents) *(Terminated)*

1515-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Dean Bell and, Director of Employment Standards (Respondents) *(Terminated)*

1516-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Mark Struthers and, Director of Employment Standards (Respondents) *(Terminated)*

1517-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Corinne Lalonde and, Director of Employment Standards (Respondents) *(Terminated)*

1518-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Sheila Gracey and, Director of Employment Standards (Respondents) *(Terminated)*

1519-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. William Wright and, Director of Employment Standards (Respondents) *(Terminated)*

1520-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Margaret Nichols and, Director of Employment Standards (Respondents) *(Terminated)*

1521-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. James Muldoon and, Director of Employment Standards (Respondents) *(Terminated)*

1522-09-ES: Perth Soap Manufacturing Inc. o/a Perth Soap (Applicant) v. Steven McDaniel and, Director of Employment Standards (Respondents) *(Terminated)*

1523-09-ES: Norman Elmer Delong (Applicant) v. Global Driver Services Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

1524-09-ES: 1566996 Ontario Inc. o/a Pizza Pizza (Applicant) v. Sarah and, Director of Employment Standards (Respondents) *(Terminated)*

1741-09-ES: Fuju Wang/Aiman Wang (Applicant) v. Design Plus Embroidery Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

1786-09-ES: Shah Z. Islam (Applicant) v. J. Ennis Fabrics Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

0824-08-HS: Greater Essex County District School Board (Applicant) v. Ontario Secondary School Teachers' Federation (District 9), CUPE Local 27, Elementary Teachers Federation of Ontario, Canadian Union of Public Employees, Local 1348 and, Rick Taggart, Inspector (Respondents) *(Withdrawn)*

1523-08-HS: Greater Essex County District School Board (Applicant) v. CUPE Local 27, CUPE Local 1348, Greater Essex County Local of ETFO, OSSTF District 9, The International Union of Bricklayers and Allied Craftsmen, Local 6, International Brotherhood of Electrical Workers, Local 773, The International Union of Painters and Allied Trades, Local 1494, Labourers' International Union of North America, Local 625, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, United Brotherhood of Carpenters and Joiners of America, Local 494 and, T. Waraich, Inspector (Respondents) *(Withdrawn)*

0463-09-HS: Roger S. Fontaine (Applicant) v. Queen in Right of Ontario (Ministry of Labour) and, Rosalind Crawford, Inspector (Respondents) *(Withdrawn)*

1094-09-HS: Sheridan College (Applicant) v. Ontario Public Service Employees Union and, Tom Parco, Inspector (Respondents) *(Withdrawn)*

1103-09-HS: Tikinagan Child and Family Services (Applicant) v. Terry Baker, and, Steven Briscoe, Inspector (Respondents) *(Withdrawn)*

1351-09-HS; 1352-09-HS: Just Energy Inc. (Applicant) v. Diana Saldanha and, Joel Magnan, Inspector (Respondents) *(Withdrawn)*

1475-09-HS: Toronto Transit Commission (Applicant) v. Amalgamated Transit Union, Local 113 and, Paul Faustino, Inspector (Respondents) *(Dismissed)*

1487-09-HS: Highland Farms Inc. (Applicant) v. Jason Williams, Inspector (Respondent) *(Withdrawn)*

1488-09-HS: Highland Farms Inc. (Applicant) v. Jason Williams, Inspector (Respondent) *(Granted)*

1538-09-HS: Jennifer Penner (Applicant) v. H.B.C. Home Outfitters, Gordon J. Gillespie - Inspector Ministry of Labour (Respondents) *(Dismissed)*

FIRST AGREEMENT - DIRECTION

3758-08-FC: Service Employees International Union, Local 1 Canada (Applicant) v. St. Michael's Homes (Respondent) *(Withdrawn)*

1300-09-FC: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Deluca Roofing Inc. (Respondent) *(Withdrawn)*

1358-09-FC: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Permanent Paving Ltd. (Respondent) *(Terminated)*

PAY EQUITY ACT

2256-08-PE: Saydat Hospitality Inc. operating as Comfort Inn Motel (Welland) (Applicant) v. Beverly Pottle and, 2059419 Ontario Inc. (Respondents) *(Granted)*

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

1496-09-M: Canadian Union of Public Employees (Applicant) v. Mayfield Retirement Residence (Respondent) *(Terminated)*

REFERRAL FROM MINISTER (SECTION 115)

0364-09-M: Natrel Division of Agropur Cooperative (Applicant) v. International Union of Operating Engineers, Local 772 (Respondent) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1648-08-R: International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 765 (Applicant) v. Bétons Préfabriqué Trans-Canada Inc. , BPDL Precast Concrete International Inc. , Bétons GFRC Inc. Bétons Préfabriqué du Lac Inc. (Respondents) *(Dismissed)*

3255-08-ES: Raouf Barakat (Applicant) v. Inter-Cultural Neighbourhood Social Services and, Director of Employment Standards (Respondents) *(Granted)*

3406-08-ES: Grand Niagara Golf Corp. (Applicant) v. Christina Morgan and, Director of Employment Standards (Respondents) *(Dismissed)*

3654-08-ES: Susan Gray (Applicant) v. Springfield Hotels Airport Inc. operating as Hampton Inn & Suites Toronto Airport and, Director of Employment Standards (Respondents) *(Dismissed)*

0163-09-ES: 1339048 Ontario Inc. o/a Lakers Tap & Grill Games (Applicant) v. Wilma Adriaans and, Director of Employment Standards (Respondents) *(Dismissed)*

0824-09-U: Dolores Schram (Applicant) v. CAW Local 636 (Respondent) v. Woodstock General Hospital Trust (Intervener) *(Dismissed)*

1447-09-R: Canadian Construction Workers' Union (Applicant) v. Kingsdale Bayview Estates Limited, and/or, Luxor Construction Corporation (Respondents) *(Dismissed)*

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